AND

HEALTH REVIEW COMMISSION

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Robert Simpson v. Kenta Energy, Inc., Docket No. KENT 83-155-D. (Judge Broderick, February 26, 1985).

Secretary of Labor, MSHA v. Cotter Corporation, Docket No. WEST 84-26-M. (Judge Carlson, March 6, 1985).

Emiliano Rosa Cruz v. Puerto Rican Cement Co., Docket No. SE 83-62-DM. (Judge Broderick, March 7, 1985).

Review was denied in the following case during April:

Secretaty of Labor, MSHA v. Consolidation Coal Company, Docket Nos. WEVA 83-280-R, 83-281-R, 84-16-R. (Judge Steffey, March 1, 1985).

COMMISSION DECISIONS

April 12, 1985

EMILIANO ROSA CRUZ :
: Docket No. SE 83-62-DM
v. :
:
PUERTO RICAN CEMENT COMPANY, INC. :

DIRECTION FOR REVIEW AND ORDER

The petition for discretionary review filed by Puerto Rican Cement Company is granted. In his decision in this matter the administrative law judge concluded that complainant was discharged in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c), and ordered payment of backpay, interest, attorneys fees and costs, and complainant's reinstatement.

In his decision on the merits of the discrimination claim, the judge expressly declined to make factual findings concerning testimony at the hearing that complainant had threatened the life of the operator' assistant personnel manager. 6 FMSHRC 1753, 1760 (July 1984). The judge stated that since the threat allegedly was made subsequent to complainant's discharge, it was "not relevant to this proceeding." Although the alleged conduct has no bearing on whether complainant was discharged illegally, it may affect the relief to which complainant is entitled. In certain circumstances, post-discharge opprobrious conduct may render an order of reinstatement inappropriate. See, e.g., Alumhaug Coal Corp. v. NLRB, 635 F.2d 1380, 1385-86 (8th Cir. 1980); Mosher Steel Co. v. NLRB, 568 F.2d 436 (5th Cir. 1978); NLRB v. Yazoo Valley Electric Power Ass'n., 405 F.2d 479, 480 (5th Cir. 1968); NLRB v. R.C. Can Co., 340 F.2d 433 (5th Cir. 1965). Such conduct may also toll the period of time for which backpay is due. Alumbaugh Coal Corp. v. NLRB, 635 F.2d at 1386. Therefore, we remand to the judge for reconsideratior and further findings on this issue. We intimate no views, however, as to the appropriate resolution of this issue, leaving this determination in the first instance to the trier of fact.

We also are troubled by the denial of the operator's request for ar opportunity to depose complainant concerning his attempts to obtain interim employment and the extent of his interim earnings. In this proceeding, the judge first decided the merits of the discrimination claim and then ordered the parties to file written submissions as to relief. In light of complainant's written submissions, certain questior were raised by the operator concerning complainant's interim employment and earnings. The operator seeks to depose complainant and obtain a statement of his earnings from the Social Security Administration. In

Accordingly, the case is remanded to the Administrative
for further expedited proceedings consistent with this order.
thereafter adversely affected or aggrieved may thereafter file
for discretionary review with the Commission in accordance wit
§ 823(d)(2).

Richard V. Backley, Acting

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April 29, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 8 WEVA 8 WEVA 8
v.	:	
CONSOLIDATION COAL COMPANY	:	

BEFORE: Backley, Acting Chairman; Lastowka, Nelson, Commi

ORDER

BY THE COMMISSION:

On April 9, 1985, the Commission issued a notice infor parties that the petition for discretionary review filed in by Consolidation Coal Company (Consol) had not been granted dingly, that the decision of the administrative law judge wa order of the Commission. 30 U.S.C. § 823 (d)(1).

On April 24, 1985, the Commission received a "petition consideration" from Consol. The petition for reconsideratio

> At the present time, the Commission is composed of three members. If the Commission presently consisted of its statutory five members, it would be more likely that this non-frivolous appeal, which is of great importance to Consol specifically and the mining industry in general, would be ordered reviewed.

Consol requests that the Commission reconsider and grant its

or discretionary review, the administrative law judge's decision, and he entire record were fully considered by each of the present members f the Commission. No two members, however, voted to grant the petition nd the judge's decision became the final order of the Commission 40 days fter its issuance. 30 U.S.C. § 823(d)(1) and (2). No reasons have been dvanced by Consol justifying the reconsideration it seeks. Further review f the Commission's final order is available in an appropriate U.S. Court Appeals. 30 U.S.C. § 816(a).

Accordingly, the petition for reconsideration is denied.

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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April 29, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 84-23
JIM WALTER RESOURCES, INC.	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), we are called upon to examine the safeguard provisions of 30 C.F.R. § 75.1403. The specific issue presented is whether 30 C.F.R. § 75.1403-5(g), dealing with the provision of a clear travelway at least 24 inches wide "on bo sides of all belt conveyors," applies to the transportation of coal on coal-carrying belt conveyors. The Commission's Chief Administrative La Judge answered the question in the negative and vacated a citation alleging a violation of a safeguard issued pursuant to section 75.1403. The judge concluded that the cited regulatory provision and section 75.1403, as well as Part 75 Subpart O of 30 C.F.R. (in which section 75.1403 is contained), do not apply to the transportation of coal on coal-carrying belt conveyors. 6 FMSHRC 1815 (July 1984)(ALJ). 1/

1/ As discussed below, section 75.1403-5(g) was promulgated to imple section 314 of the Mine Act. 30 U.S.C. § 874. Section 314 of the Act entitled "Hoisting and Mantrips," was adopted without change from the 1969 Coal Act. 30 U.S.C. § 801 et seq. (1976)(amended 1977). The regulatory counterpart of section 314 of the Act is Subpart O of 30 C.F.R. Part 75, also entitled "Hoisting and Mantrips," which includes 75.1400 through 75.1405. Section 75.1403 repeats section 314(b) of th Act, 30 U.S.C. § 874(b):

> Other safeguards adequate, in the judgment of an authorized repre sentative of the Secretary [of Labor], to minimize hazards with respect to transportation of men and materials shall be provided.

(footnote 1 continued)

84-166 & WEVA 84-94-R (decided this same date).

On September 8, 1981, an inspector of the Department of La
Mine Safety and Health Administration ("MSHA"), T. J. Ingram, c
an inspection of the Jim Walter Resources ("JWR") No. 3 undergr
mine. Pursuant to section 75.1403, the inspector issued to JWR
to provide safeguard" No. 0758641, which stated:

> Twenty-four inches of travel space was not provided between the No. 3 longwall belt and the right rib along the pillar inby the No. 1 header. Twenty-four inches of travel shall be provided on both sides of the belt.

On September 8, 1984, while inspecting the same mine, MSHA
Luther McAnally issued the instant citation, which referred to s
75.1403-5(g) and alleged a violation of the safeguard notice issu
Inspector Ingram:

> A clear travelway of at least 24 inches on each side of the North Mains A and B belt was not maintained in that large rocks, rolls of belt, and belt structures were obstructing the walkways. Safeguard No. 0758641 was issued by T.J. Ingram on September 8, 1981.

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footnote 1 continued

The procedure by which an authorized representative of the Se
of Labor may issue a citation pursuant to section 75.1403 is descr
in 30 C.F.R. § 75.1403-1(b):

> The authorized representative of the Secretary shall in
> advise the operator of a specific safeguard which is required
> pursuant to § 75.1403 and shall fix a time in which the opera
> shall provide and thereafter maintain such safeguard. If the
> safeguard is not provided within the time fixed and if it is
> maintained thereafter, a notice shall be issued to the operat
> pursuant to section 104 of the Act.

30 C.F.R. §§ 75.1403-2 through 75.1403-11 set forth specific
by which authorized representatives are guided in requiring safegua
Section 75.1403-5 is headed: "Criteria -- Belt Conveyors," and -5(
the subsection at issue in this case, states in part:

> A clear travelway at least 24 inches wide should be provided o
> both sides of all belt conveyors installed after March 30, 197

In his decision, the judge expressed his agreement with an earlier unreviewed holding by another Commission judge that the statutory and regulatory intent behind section 75.1403 and subsection -5(g) is to address hazardous conditions associated with belt conveyors that transport persons and materials other than coal. 6 FMSHRC at 1819, citing Monterey Coal Co., 6 FMSHRC 424, 451-58 (February 1984)(ALJ). Noting that the safeguard provisions of section 75.1403 are contained in Subpart O, entitled "Hoisting and Mantrips," the judge construed the reference to the "transportation of men and materials" to exclude the transport of coal. 6 FMSHRC at 1819. The judge stated that if the Secretary believed that coal-carrying belt conveyors could be covered under Subpart O, "it would have been a simple matter for him to specifically include them." Id. Lastly, the judge noted that coal-carrying belt conveyors are mentioned specifically in 30 C.F.R. § 75.303. That provision is based on section 303 of the Mine Act, 30 U.S.C. § 863, and deals with pre-shift and on-shift inspections of belt conveyors. The judge viewed the contrast between the reference to coal-carrying belt conveyors in section 75.303 and the lack of express reference to such belts in section 75.1403 as a further indication that section 75.1403 was not intended to apply to coal-carrying belt conveyors. Id.

The argument that section 314 of the Mine Act and Subpart O of 30 C.F.R. Part 75 are limited to the movement of persons and materials other than coal is based on the lack of specific references to "coal-carrying belt conveyors" in these provisions. We find the absence of such explicit mention to be immaterial in view of the inclusive purpose and language of these provisions. We conclude that section 314(b) authorizes the Secretary of Labor to require safeguards with respect to coal-carrying belt conveyors and that the relevant regulations of Subpart O apply to such belts.

The regulatory provisions contained in Subpart O were promulgated to implement section 314 of the Act. Therefore, in construing these regulations, we must look first to the meaning of the statutory provision they effectuate. See Emery Mining Corp., 5 FMSHRC 1400, 1401-02 (August 1983), aff'd sub nom. Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414 (10th Cir. 1984). Before focusing on section 314(b), which deals specifically with the subject of safeguards, we examine section 314 from a general perspective.

Unquestionably, a major regulatory concern of section 314, entitled "Hoisting and Mantrips," is the transport in coal mines of persons and of "materials" in the form of equipment and supplies. However, that concern does not exhaust the scope of section 314. Sections 314(e) and (f), for example, address safe braking, stopping, and coupling with respect to "locomotives," "haulage cars," and "haulage equipment." As we have indicated in a related context, the term "haulage car" in mining parlance refers to a car that carries ore, in addition to personnel,

..., is cast in broad terms:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

30 U.S.C. § 874(b) (emphasis added). Section 314(b) is found in a statutory section that, as concluded above, applies to the transport of coal. In this context, reading "transportation of ... materials" to encompass the movement of coal is both natural and logical. The term "transportation" is not qualified by type, power, or mode of transport used. We read the term to cover both track and trackless haulage (n. infra). "Material" is also a broad term. See Webster's Third New Int'l Dictionary (Unabridged) 1392 (1971). The broad language of section 314(b) manifests a legislative purpose to guard against all hazards attendant upon haulage and transport in coal mining, regardless of that which is transported or the mode of transport used.

The legislative history relevant to section 314(b) further evidences such a purpose:

> This section authorizes the inspector to require certain safeguards for transporting men and materials.
>
> All mantrip and haulage operations regardless of the motive power or conveyance may be hazardous. It therefore has been deemed wise to make the mandatory provisions all inclusive and not just confine it to any one type of conveyance.

S. Rep. No. 411, 91st Cong., 1st Sess. 81 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 207 (1975)(emphasis added). In light of the foregoing considerations, we interpret section 314(b) to authorize the Secretary of Labor to require "[o]ther safeguards ... to minimize

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27 "Haulage," the general concern addressed by section 314, refers to the transportation of ore, personnel, waste, supplies, and equipment. See FMSHRT 530. The two major modes of haulage are track haulage (vehicles running on tracks) and trackless haulage; the latter includes wheeled haulage and conveyor haulage. See, e.g., S. Cassidy (ed.), Elements of Practical Coal Mining 125-42 (1973).

In this case: whether the Secretary availed himself of section 314's grant of authority by addressing, in his Subpart O regulations, safeguar requirements for coal-carrying belt conveyors. At first glance, the fact that the specifically challenged regulatory provision, section 75.1403-5(g), refers broadly to "all belt conveyors" (emphasis added) would appear to provide an affirmative answer to that question. Nevertheless, we are met with a related series of objections that Subpart O as a whole, section 75.1403 entitled "Other safeguards," and section 75.1403-5 entitled "Criteria--Belt conveyors," all exclude the movement of coal. For reasons similar to those developed in our examination of section 314, we find no such restrictions.

We start with Subpart O itself. 30 C.F.R. § 75.1401, a section of general applicablity covering "hoists" used to transport either persons or "materials," deals with the rated load capacities of "hoists" and the position indicators of "the cage, platform, skip, bucket or cars." All the key terms in section 75.1401 refer, in part, to the transportation of ore in mines. See DMMRT 146, 160, 172, 709, 834, & 1021. 30 C.F.R. § 75.1404 sets braking requirements for "locomotives and haulage cars," and 30 C.F.R. § 75.1405 requires automatic couplers for "all haulage equipment." As demonstrated above in our discussion of the correspondin provisions in section 314, these haulage references are to equipment and processes involved in the transport of coal. Thus, the regulatory provisions contained in Subpart O are not limited to the movement of persons and materials other than coal. Again, while the title to the subpart, "Hoisting and Mantrips," provides a convenient indication of one core concern, the heading is not all inclusive of the subpart's content.

Section 75.1403 itself simply restates section 314(b) of the Act. Accordingly, this regulatory provision repeats the broad statutory language, which, for the reasons set forth earlier, may be applied to the transportation of coal on belt conveyors. Section 75.1403 is part of a larger regulatory subpart that, as just discussed, extends to the movement of coal. Aside from section 75.1403-5, which contains the criteria concerning belt conveyors, a number of the subsections of 75.1403 deal, in part, with the transport of coal. 30 C.F.R. § 75.1403- sets braking standards for "hoists" and "elevators" for the transportati of "materials," and uses the terms "cage, skip, car or other devices." All the relevant terms in this section connote, in part, the movement of coal. 30 C.F.R. § 75.1403-8 sets criteria for "track haulage" roads.

3/ Reliance has been placed on the title of section 314 (and of Subpar O), "Hoisting and Mantrips," as an indication that only the transport of persons and materials other than coal is covered. As we have observed previously, titles and organizational arrangements may serve as intrinsi aids to construction in appropriate instances. Frequently, however, titles are merely summary highlights of general content or legislative objectives. In cases of seeming conflict between a shorthand title and clear legislative purpose or text, the latter must control. Allied

75.1403 contains criteria that address the entirety, i transportation of coal, as well as the transportation of personnel and other materials. We therefore reject the judge's conclusion that sect 75.1403 authorizes safeguards only with respect to the transportation men and materials other than coal.

Nor can we find that section 75.1403-5 or its subsection (g) were intended to exclude coal-carrying belt conveyors from coverage. We interpret the criteria at 30 C.F.R. §§ 75.1403-5(a), (b), (c), (d), (e) (f), and (i) to require the implementation of additional safety feature and practices when belt conveyors are used for the transportation of persons and materials other than coal. 30 C.F.R. § 75.1403-5(h), howev sets out less stringent requirements on belt conveyors that "do not transport men." A reasonable interpretation of this subsection, given the wide scope of Subpart O, is that it applies to belts that carry coal. Likewise, section 75.1403-5(j), which prohibits persons from crossing "moving conveyor belts," necessarily applies to all moving belts, whatever they carry, because the hazard presented is the same.

Turning to the criterion at issue, section 75.1403-5(g), the most natural reading of the plain language of subsection (g) is that it applies to all belt conveyors regardless of whether they move coal, personnel, or materials other than coal. Nevertheless, the judge concluded, in part, that coal-carrying belts are properly the subject of section 75.303, and not of section 75.1403, because Congress, in section 303(d) of the Act (and the Secretary in 30 C.F.R. § 75.303) clearly distinguished between coal-carrying and person-carrying belts. However, section 75.303 only specifies the requirements for pre-shift and on-shift examinations of belt conveyors, and does not set general safety standards for belt conveyors. The only reference to coal-carrying belts in section 75.303 is that "they shall be examined after the shift has begun." We cannot view this separate statutory and regulatory reference as a convincing indication that the broad language of section 314, Subpart O, and section 75.1403-5(g) does not extend to coal-carrying belt conveyors.

More fundamentally, the very purpose of these provisions -- the elimination of transportation-related hazards -- militates against the distinctions that we have been asked to recognize. Section 75.1403-5(g) authorizes safeguards that provide for a "clear travelway ... on both sides of all belt conveyors...." Miners frequently must work, carry out inspection activities, and pass alongside moving coal-carrying belt conveyors. Injuries to miners resulting from accidental contact with these belts would be no different than those involving contact with non-coal-carrying conveyors. Therefore, we find no basis for limiting the requirement of unobstructed travelways to one type of belt conveyor and not the other.

section 75.1403-5(g). See Southern Ohio Coal Co., supra. 4/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

4/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we hav designated ourselves as a panel of three members to exercise the powers of the Commission.

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WASHINGTON, D.C. 20006

April 29, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 82-3
FREEMAN UNITED COAL MINING CO.	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). The question pres is whether the Secretary of Labor proved a violation of 30 C.F.R. § 75 The Commission's administrative law judge found that a violation was established and assessed a $150 penalty. 5 FMSHRC 590, 595-96 (March (ALJ). For the reasons that follow, we reverse.

Section 75.301 provides in part:

> The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute....

During a safety and health inspection at Freeman United Coal Mini Co.'s ("Freeman") Crown No. 2 Mine, Mine Safety and Health Administrat (MSHA) Inspector John D. Stritzel proceeded to the last open crosscut between Rooms 21 and 22 in the 4th southwest section. Inspector Strit was accompanied by David Webb, the assistant to the mine superintenden and Freeman's inspector escort, and by Rick Reed, the miner's walkarou representative. The MSHA inspector attempted to calculate the volume air at the crosscut. 1/ In making such a calculation the air velocity

1/ The volume of air is the quantity of air flowing through a segmen of an entry in a given time. Air quantity is calculated by multiplyin

The inspector divided the crosscut into four quadrants and he and Reed conducted four or five smoke cloud tests in each quadrant. The inspector measured a distance of 10 feet in length along the floor of the two lower quadrants. Reed stood at the "upstream" end of the ten foot line and squeezed the aspirator bulb to release the smoke cloud upon the inspector's command. Reed tried to position himself so that the cloud was released at the beginning of the 10 foot line. The inspector stood at the "downstream" end of the 10 foot line and timed the cloud's speed with the second hand of his wrist watch. The inspector picked a spot high on the rib, in line with the end of the ten foot distance, and when the cloud passed this spot he noted the time. The inspector averaged the times for each quadrant and then averaged the results to obtain the air velocity at the crosscut. These procedures were observed by management representative Webb. The inspector then measured the height and width of the entry, and he multiplied the height by the width to obtain the cross-sectional area of the entry. Multiplying the air velocity by the area of the entry, the inspector calculated the quantity of air reaching the last open crosscut to be 7,654.5 cfm. Because this was less than the required minimum of 9,000 cfm, he issued a citation for a violation of section 75.301.

Subsequently, the MSHA inspector lost the notes containing the figures obtained as a result of his tests, and his measurements and calculations. At the hearing he was unable to recall any of the specific figures. However, both the inspector and miner representative Reed testified regarding the general procedures they had used to conduct the smoke cloud tests. After the Secretary presented his case-in-chief, counsel for Freeman moved to vacate the citation on the basis that the test result alone, without the underlying measurements, could not establish

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2/ The basic instruments normally used to measure air velocity are the rotating vane anemometer and the chemical smoke tube. The vane anemometer is a small windmill geared to a mechanical counter. The chemical smoke tube is a plastic or glass pipe with an aspirator bulb at one end. Smoke is generated into the mine's atmosphere by squeezing the aspirator bulb which forces air through the tube containing a smoke generating chemical. The smoke cloud moves with the air stream and the cloud is timed over a known distance laid out along the floor of the mine entry. Smoke cloud measurements are made by two individials. In essence, one person is positioned with the smoke tube at the "upstream" end of the timing distance and the other is positioned with a timing device at the "downstream" end of the timing distance. The smoke is released at the "upstream" position on the command of the timer, who starts timing simultaneously with the release of the smoke or when the cloud passes a preselected starting point. Timing is stopped when the cloud passes the timer. The velocity of the air is determined by calculating the number of feet the cloud has traveled, the time it has taken to cover that distance, and then converting those figures into a feet per minute measurement.

test results. They called into question the test procedures by citing to U.S. Bureau of Mines published documents addressing the use of smoke cloud tests, generally accepted scientific principles, and by expressing opinions based upon their own mining experience.

The judge rejected Freeman's arguments. He found that the air reaching the last open crosscut "was approximately 7,654.5 cubic feet per minute." 5 FMSHRC at 593. He found it "significant ... that [Freema ... did not itself take a smoke test." 5 FMSHRC at 596. He concluded, "[T]he test was validly taken and the results showed a violation." Id.

Because the precise quantity of air in a mine entry is not susceptil to perceptual determination, proof by test result is a necessary and common element in an MSHA enforcement action. Such proof, however, is not immune from challenge at a hearing, and it is the Secretary who bears the burden of establishing the violation he has alleged and of establishing the adequacy of the proof he offers. In this case, determination of air quantity required the inspector to make four types of mathematical calculations: averaging the smoke cloud test results; conversion of the average from feet per second into feet per minute; multiplication of entry height by entry width; and multiplication of the average air velocity by the area of the entry. Although there is no way to prove absolutely that computations such as these are correctly made without the underlying data, the lack of such data is not necessarily fatal per se to the finding of a violation. For example, (1) such a challenge may not be raised by the mine operator or (2) there may be sufficient additional evidence of the scientific reliability of the test methodology employed by the inspector to corroborate the result. Howeve where an operator contests the violation, is unable to obtain the underlying data and challenges the Secretary's failure to produce it, nnd where impeaching evidence of probative worth raises questions regarding the test methodology, the test result, standing alone, will not support a violation. In such circumstances, the record does not afford a basis for an analysis by which the administrative law judge and, ultimately, this Commission may verify the validity of the result. Wirtz v. Baldor Electric Co., 337 F.2d 518, 529-30 (D.C. Cir. 1964). See also Avnet, In 78 FTC 1562, 1563 n. 1 (1971).

The evidence presented by Freeman in this case raised serious questions regarding the validity of the test procedures and, hence, of the accuracy of the test result. Significantly, the Secretary did not introduce any evidence regarding MSHA approved procedures for conducting smoke cloud tests or the instructions MSHA provides to its inspectors for conducting the tests. Nor did the Secretary's witnesses testify as to test procedures generally accepted in the mining industry. Thus, given the complete lack of underlying data, the questions raised by Freeman concerning the validity of the test methodology employed in this case, and the lack of evidence regarding smoke cloud test methodology

Accordingly, the administrative law judge's conclusion that Free violated 30 C.F.R. § 75.301 is reversed, and the citation is vacated.

Richard V. Backley, Acting Chairm

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

3/ While Freeman might also have challenged the Secretary's assert of a violation by conducting its own tests, its failure to do so did diminish the effect of the evidence that was offered by Freeman. It the Secretary's responsibility to investigate, allege, and prove vio

4/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), have designated ourselves as a panel of three members to exercise th powers of the Commission.

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SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

JIM WALTER RESOURCES, INC.

Docket No. SE 84-57

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Comml

DECISION

BY THE COMMISSION:

This civil penalty proceeding arising under the Federal M and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), mirror issues presented in Jim Walter Resources, 7 FMSHRC ___, Docket 84-23 (decided this same date) ("Jim Walter Resources I"). Th at issue in this case alleges a violation of 30 C.F.R. § 75.14 for failure to provide 24 inches of unobstructed clearance alo sides of a coal-carrying belt conveyor due to the presence of rocks, timbers, belt, belt structures, and the closeness of th The underlying notice to provide safeguard, issued pursuant to § 75.1403, is the same notice involved in Jim Walter Resources the issue presented is also the same: whether section 75.1403- applies to coal-carrying belt conveyors.

In lieu of a hearing, the parties stipulated that the co occurred as described in the citation; that the belt conveyor coal-carrying conveyor; and that the earlier decision of the C Chief Administrative Law Judge, in Jim Walter Resources I, 6 F 1815, 1819 (July 1984)(ALJ), controlled. Based on that decis finding that section 75.1403-5(g) does not apply to coal-carry conveyors, the judge vacated the citation. 6 FMSHRC 2723 (Dec 1984)(ALJ). We granted the Secretary's petition for discretio review.

remand for further proceedings and findings as to whether the conditions cited constitute a violation of the safeguard issued under section 5.1403-5(g). See Southern Ohio Coal Co., 7 FMSHRC ___, Docket No. WEVA 84-166 (issued this same date). 1/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

Robert W. Pollard, Esq.
Jim Walter Resources, Inc.
P.O. Box C-79
Birmingham, Alabama 35283

Ms. Joyce Hanula
United Mine Workers of America
900 15th St., N.W.
Washington, D.C. 20005

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K Street, N.W.
Washington, D.C. 20006

April 29, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEVA 84-166
	:	WEVA 84-94-R
SOUTHERN OHIO COAL COMPANY	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), presents issues concerning the applicability to coal-carrying belt conveyors of the safeguard provisions of 30 C.F.R. § 75.1403. 1/ A Commission administr

1/ 30 C.F.R. § 75.1403 repeats section 314(b) of the Mine Act, 30 U.S.C. § 874(b), and states:

> Other safeguards adequate, in the judgement of an authorized representative of the Secretary [of Labor], to minimize hazards with respect to transportation of men and materials shall be provi

The procedures by which an authorized representative of the Secret may issue a citation pursuant to section 75.1403 are described in 30 C.F.R. § 75.1403-1(b).

> The authorized representative of the Secretary shall in writi advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

30 C.F.R. §§ 75.1403-2 through 75.1403-11 set forth specific "crit by which authorized representatives are guided in requiring safeguards. Section 75.1403-5 is headed: "Criteria--Belt conveyors" and section 75.1403-5(g) states in part:

Resources, Inc., 7 FMSHRC ____, Docket No. SE 84-23 (decided t
date) ("Jim Walter Resources I"), we affirm the judge's conclu
section 75.1403 extends to the transportation of coal on coal-
belt conveyors. However, for the reasons stated below, we reve
Judge's conclusion that a violation of section 75.1403 occurre

On September 14, 1978, during an inspection of SOCCO's Ma
1 underground coal mine, MSHA inspector Dominick Poster issued
provide safeguard No. 018972 pursuant to section 314(b) of the
and 30 C.F.R. § 75.1403. The notice stated:

> A clear travelway at least 24 inches along the No. 1 conveyor belt was not provided at three (3) locations, in that there was fallen rock and cement blocks.
>
> All conveyor belts in this mine shall have at least 24 inches of clearance on both sides of the conveyor belts.
>
> This is a notice to provide safeguards.

On November 30, 1983, during a regular inspection of the same
inspector Harry Marksley, Jr. issued the citation at issue her
a violation of section 75.1403. The citation stated:

> A clear travelway of 24 inches was not provided along the 1-1 east conveyor belt for a distance of 15 feet in that water was 10 inches in depth from rib to rib at the No. 7 stopping. A slipping and stumbling hazard.

At the hearing before the Commission judge, witnesses for
parties agreed that the cited 1-1 east belt conveyor was used
coal only, and that the distance between the belt and the ribs
sides of the conveyor was at least 24 inches. The witnesses a
that the water described in Inspector Marksley's citation exte
rib to rib for a distance of 15 feet. MSHA's witnesses measur
depth of the water at one point as 10 inches. They also testi
the water, in combination with the fireclay bottom, rock dust
the area, created a serious slipping and stumbling hazard for
maintenance men, inspectors and workers who regularly traveled
line. Inspector Marksley testified that damp bottom condition

In his decision, the judge found it unnecessary to resolve whether coal is a "material" within the purview of 30 C.F.R. § 75.1403. Instead, he resolved the issue of the standard's applicability by determining that "the safeguard standard applies ... to minimizing hazards associated with the transportation of men and materials by foot, in this case miners traveling along the walkway adjacent to the moving conveyor belt." 6 FMSHRC at 2687. Analyzing the citation and underlying safeguard notice, the judge found that, even under a strict construction of the safeguard notice, the water presented not only a "slipping" hazard but also a "tripping and stumbling" hazard. 6 FMSHRC at 2687-88. The judge reasoned that although "fallen rock" or "cement blocks," the items specifically referred to in the safeguard notice, and other similar debris were not found in the water, it could "reasonably be inferred from the evidence that such debris could very well come to rest under the water from the adjacent ribs." 6 FMSHRC at 2688. The judge concluded that the safeguard notice, in essence, required a clear travelway of 24 inches on both sides of the beltline, and that the cited travelway was not clear due to the obstruction caused by the water. Id.

On review, SOCCO argues that the references in section 314(b) of the Mine Act and in section 75.1403 to the "transportation of men and materials" refers only to the movement of persons and materials other than coal. SOCCO therefore contends that section 75.1403 and its subsection -5(g) do not apply to the transport of coal on coal-carrying belt conveyors. SOCCO further argues that even if the Commission decides that the relevant safeguard provisions of section 75.1403 apply to coal-carrying belt conveyors, safeguard notices are to be strictly construed. SOCCO asserts that the safeguard provisions of the Act and the Secretary's regulations confer extraordinary authority on the Secretary. SOCCO urges that to avoid abuse of that authority, notices to provide safeguards must be written with such precision and specificity as to leave no doubt as to the conditions or hazards proscribed.

For the reasons set forth in our decision in Jim Walter Resources I, we conclude that section 75.1403, and its subsection -5(g), are applicable to coal-carrying belt conveyors. As explained in Jim Walter Resources I, this provision applies to trackless haulage by all conveyors. Thus, while we agree with the judge in result on this point, we do not rest our conclusion on his rationale that section 75.1403-5(g) encompasses transportation of materials by foot.

It is of paramount importance to recognize the crucial differe in the rules of interpretation applicable to mandatory standards pr by the Secretary and those applicable to "safeguard notices" issued his inspector. This Commission previously has recognized that, in of the underlying purpose of the Mine Act, mandatory standards are construed in a manner that effectuates, rather than frustrates, the intended goal. See, e.g., Allied Chemical Corp., 6 FMSHRC 1854, 18 (August 1984); Cleveland Cliffs Iron Co., 3 FMSHRC 291, 294 (Februa 1981). Mandatory standards, however, are adopted through the notic comment rulemaking procedures set forth in section 101 of the Mine Section 314(b) of the Mine Act, on the other hand, grants the Secre a unique authority to create what are, in effect, mandatory safety standards on a mine-by-mine basis without resorting to otherwise re rulemaking procedures. We believe that in order to effectuate its purpose properly, the exercise of this unusually broad grant of reg power must be bounded by a rule of interpretation more restrained t that accorded promulgated standards. Thus, we hold that a safeguar notice must identify with specificity the nature of the hazard at w it is directed and the conduct required of the operator to remedy s hazard. We further hold that in interpreting a safeguard a narrow truction of the terms of the safeguard and its intended reach is re See, e.g., Consolidation Coal Co., 2 FMSHRC 2021, 2035 (July 1980) (Jim Walter Resources, 1 FMSHRC 1317, 1327-28 (September 1979) (ALJ). also Secretary's Brief to the Commission at 11 n. 1. ("Accordingly while the language of safeguard notices should be narrowly construe the Secretary's issuance authority must be interpreted broadly").

We believe that this approach towards interpretation of the sa provisions strikes an appropriate balance between the Secretary's a to require additional safeguards and the operator's right to notice the conduct required of him. We further believe that the safety of miners is best advanced by an interpretive approach that ensures th the hazard of concern to the inspector is fully understood by the o thereby enabling the operator to secure prompt and complete abatemen

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2/ The requirements of specificity and narrow interpretation are license for the raising or acceptance of purely semantic arguments. See, e.g., Penn Allegh Coal Co., 4 FMSHRC 1224, 1226 (July 1982). recognize that safeguards are written by inspectors in the field, n a team of lawyers.

inches of clearance on both sides of the conveyor belt should have put SOCCO on notice that conditions such as the water described in the citation fell within the safeguard's prohibitions. We conclude that it did not.

The underlying safeguard notice was issued by an inspector concerned with the presence of cement blocks and rocks in a travelway. The presence of these solid objects in the walkway would present an obvious stumbling hazard and, depending on the amount of material or debris, could prevent passage altogether. Abatement of the identified condition could readily occur by removal of these objects. Similar physical impediments to safe travel have been the subject of identical safeguards issued at other mines. See, e.g., Jim Walter Resources, 6 FMSHRC 1815 (July 1984)(ALJ), rev'd on other grounds, 7 FMSHRC ____, Docket No. SE 84-23, April 29, 1985. Under the rule of interpretation enunciated above, further instances of physical obstructions in travelways, whether rocks, cement blocks, or other objects such as construction materials, mine equipment, or debris would fall within the scope of the safeguard.

The alleged obstruction cited in this case, an accumulation of water, was neither specifically identified in the safeguard notice, suggested thereby, nor in our opinion even contemplated by the inspector when he issued his safeguard notice. The presence of water in an underground coal mine is not an unusual condition; it sometimes results from its introduction into the mining process, but often it is caused by natural ground conditions. The record in this case indicates that natural water seepage was common at this mine, particularly at the location involved. Given the frequency of wet ground conditions in the mine, and the basic dissimilarity between such conditions and solid obstructions such as rocks and debris, we find that SOCCO was not given sufficient notice by the underlying safeguard notice issued in 1978 that either wet conditions in general or the particular conditions cited in 1983 by the inspector in this case would violate the underlying safeguard notice's terms.

We do not hold that a safeguard notice pertaining to hazardous conditions caused by wetness could not be issued. Conditions such as those cited by the inspector here, if hazardous, can just as readily be eliminated by issuance of safeguard notices specifically addressing such conditions. By taking this approach rather than bootstrapping dissimilar hazards into previously issued safeguard notices, the operator's right to notice of conditions that violate the law and subject it to penalties can be protected with no undue infringement of the Secretary's authority or loss of miner safety.

Richard V. Backley, Acting C

James A. Lastowka, Commissio

L. Clair Nelson, Commissione

3/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823 have designated ourselves as a panel of three members to exercis powers of the Commission.

ADMINISTRATIVE LAW JUDGE DECISIONS

April 1, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 84-17-M
	:	A. C. No. 04-04643-05501
v.	:	Sylva Sand & Gravel Mine
SYLVA SAND & GRAVEL, INC., Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U. S. Department of Labor, San Francisco, California for Petitioner.

Before: Judge Merlin

The Solicitor filed a proposal for the assessment of civ penalties for three alleged violations dated December 5, 1983 the above-captioned action. On December 6, 1983 the operator wrote me, stating that it wished a hearing.

On August 24, 1984 an Order of Assignment was issued as- signing this case to me. The Order of Assignment was mailed tified Mail and the file contains the green certified card si by the operator indicating it received the Order of Assignmen Thereafter on September 21, 1984 a Notice of Hearing was issu and on November 21, 1984 an Amended Notice of Hearing was iss The operator's copies of both notices were returned unclaimed

Pursuant to the Amended Notice of Hearing a hearing was on February 6, 1985. The Solicitor appeared but the operator not. The Solicitor withdrew the penalty petition with respec one of the citations. The inspector testified regarding the maining two citations. Citation No. 2088036 was issued for a violation of 30 C.F.R. § 50.10, a failure to notify MSHA of a accident. The inspector's description of the accident in whi miner's arm was caught in a conveyor belt adequately establis a prima facie case that the occurrence fell within the mandat standard and that there was a violation. Citation No. 208803 arising out of the same accident was issued for a failure to guard the head pulley of the conveyor belt. Here too, the inspector's recitation of the accident sufficiently made out prima facie case that the required guarding was not present a that a violation occurred.

sent to his new address. Finally, he alleges that the last notice he received was a show cause order requiring the Solic to file a penalty petition.

The operator must be held in default. According to his o admission he moved several months ago. He knew a case was pending against him. Contrary to his assertion, the last thi ng he received was not the show cause order directed to the Solicitor dated January 12, 1984 but the Order of Assignment dated August 24, 1984. It was the operator's responsibility give written notice of his change of address. 29 C.F.R. § 27 The Commission had no way of knowing where he moved. Having failed to notify the Commission of his new address the operat complaints in his letter of March 18, 1985, are without merit

It is Ordered that the operator is in default and that t proposed penalties of $100 for Citation No. 2088036 and $500 Citation No. 20868038 are final.

The operator is Ordered to pay $600 within 30 days of th date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution

Marshall P. Salzman, Esq., Office of the Solicitor, U. S. Department of Labor, 11071 Federal Building, 450 Golden Gate Avenue, Box 36017, San Francisco, CA 94012 (Certified Mail)

Mr. Eugene Sylva, Sylva Sand & Gravel, Inc., 5061 Oro Dam Boulevard, Oroville, CA 95965 (Certified Mail)

/gl

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 84-89 A.C. No. 15-10339-03526
v.	:	Pyro No. 11 Mine
PYRO MINING COMPANY, Respondent	:	

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; William Craft, Assistant Director of Safety, Pyro Mining Company, Sturgis, Kentucky, for Respondent.

Before: Judge Fauver

The Secretary of Labor brought this action for civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 891, et seq. The case was heard in Lexington, Kentucky. Having considered the evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

1. Respondent's Pyro No. 11 Mine is an underground coal mine used in connection with its Pyro No. 9 Mine to produce coal for sale or use in or affecting interstate commerce.

2. The parties have stipulated that Pyro Mining Company is subject to the provisions of the Act, that the Pyro No. 11 Mine is part of a division that produces approx 1.5 million tons of coal annually, that Pyro Mining Company previous history of violations would not be a significant factor in this case, that the assessment of the penalties i this case would not impose a financial hardship on Responde ability to remain in business, and that Respondent acted in good faith in abating the alleged violations cited in the citations involved.

Citation No. 2217258, alleging a violation of 30 C.F.R
75.507, which provides:

> Except where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air.

Inspector Lee issued the citation on the ground t
return air, air that had been used to ventilate the ac
workings of Pyro No. 9 Mine, was allowed to mix with r
air flowing through a track entry in Pyro No. 11 Mine
there were nonpermissible motors on the conveyor belt
By using an anemometer, Inspector Lee determined that
11,000 cfm of return air was being dumped into neutral
at the first main east entry overcast where it interse
with the second north main entry. Inspector Lee deter
that the return air was mixing with the neutral air i
because Respondent had removed stoppings and had faile
replace them.

4. On December 14, 1983, MSHA Inspector Paul O.
inspected part of Pyro No. 11 Mine and issued Citatio
2338301, alleging a violation of 30 C.F.R. § 75.507.

Inspector Lee issued the citation on the ground
return air, air that had been used to ventilate the a
workings of Pyro No. 9 Mine, was allowed to mix with
air flowing through a track entry in Pyro No. 11, whe
was nonpermissible electrial equipment, i.e. a batter
charger and electric water pumps. Inspector Lee used
anemometer in determining that approximately 11,500 c
return air was being dumped into neutral air at a dam
overcast at the first east panel off the first submai
entry.

DISCUSSION WITH
FURTHER FINDINGS

I find that the Secretary proved each charge by
preponderance of the evidence. Inspector Lee was jus

in relying upon Respondent's mine maps and his site inspections of Pyro No. 11 Mine in determining the two violations charged. He was not required to go into Pyro No. 9 Mine to verify the active workings and return air course shown on the maps for No. 9 Mine.

Both violations were due to negligence, because they could have been avoided by the exercise of reasonable care. They were serious violations because of the risk of a methane build-up and explosion by methane contact with nonpermissible equipment.

Considering the criteria for assessing a civil penalty under section 110(i) of the Act, I find that an appropriate civil penalty for each violation is $260.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. § 75.507 as charged in Citations Nos. 2217258 (December 7, 1983) and 2338301 (December 14, 1983) and is ASSESSED a civil penalty of $260 for each violation.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay civil penalties in the total amount of $520 within 30 days of this Decision.

William Fauver
Administrative Law Ju

Distribution:

Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, Tennessee 37203 (Certified Mail)

William Craft, Assistant Director Safety, Pyro Mining Company, P.O. Box 267, Sturgis, Kentucky 42459 (Certified Mail)

APR 4 1985

VENBLACK, INC., Contestant v.	:	CONTEST PROCEEDING Docket No. WEVA 84-152-R Citation No. 2124861; 2/22/8
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Austin Black Plant
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v.	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 84-313 A.C. No. 46-03319-03503 Austin Black Plant
VENBLACK, INC., Respondent	:	

DECISION GRANTING CONTEST AND
DISMISSING PENALTY PROCEEDINGS

Appearances: George V. Gardner, Esq., and J. Edgar Baily, Esq.
Gardner, Moss & Brown, Washington, D.C.,
for Contestant/Respondent;
James B. Crawford, Esq., Office of the Solicitor,
U.S. Department of Labor, Washington, D.C.,
for Respondent/Petitioner.

Before: Judge Lasher

A preliminary hearing on the record to determine jurisdiction was held in Falls Church, Virginia on October 17, 1984.

This matter is comprised of a contest proceeding filed by VenBlack, Inc., (herein VenBlack), on March 26, 1984, under Section 105(d) of the Federal Mine Safety and Health Act of 19 30 U.S.C. § 801 et seq., (herein the Act), and a civil penalty proceeding initiated by the Secretary of Labor on August 10, 1984, by the filing of a proposal for assessment of penalty pursuant to Section 110 of the Act.

order of September 6, 1984.

The issue is whether VenBlack is the "operator" of a "coal r other mine" and thus subject to the Act. That determination ust be made through interpretation of sections 3(d), 3(h)(1) and 2), and 4 of the Act. 30 U.S.C. §§ 802(d), (h)(1) and (2), and 03, to wit:

> Sec. 3. For the purposes of this Act, the term -
>
> * * *
>
> (d). "Operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine;
>
> * * *
>
> (h)(1). "Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams and tailings ponds, on the surface or u in, or resulting from, the work of extr minerals from their natural deposits or if in liquid form, with workers und in, or to be used in, the milling of the work of preparing coal or other m cludes custom coal preparation facili a determination of what constitutes m purposes of this chapter, the Secreta consideration to the convenience of a sulting from the delegation to one As of all authority with respect to the of miners employed at one physical es

/ Citation No. 2124861 charges VenBlack wit egal identity report in violation of 30 C.F.

coal, lignite, or anthracite from its natural
in the earth by any means or method, and the w
preparing the coal so extracted, and includes
coal preparation facilities;

* * *

Sec. 4. Each coal or other mine, the products
enter commerce, or the operations of products
affect commerce, and each operator of such min
every miner in such mine shall be subject to t
visions of this Act.

PRELIMINARY FINDINGS

VenBlack was incorporated in West Virginia in Sep
In October 1983, VenBlack purchased the Chemical Produ
Division of Slab Fork Coal Company, which was in bankr
96; Ex. C-1). Slab Fork previously had operated what
termed a completely integrated coal mine at Tams, West
where coal was actually extracted from the ground and
totally prepared in its Preparation Plant where it eng
breaking, crushing, sizing, cleaning, washing, drying
the coal. The Chemical Products Division, i.e., the m
ing plant which was the only part of the Slab Fork ope
purchased by VenBlack, was, and is, called the Austin
and is located on the same premises where the Slab For
Preparation Plant previously was located. VenBlack di
purchase the underground mine of Slab Fork or the Prep
Plant. In its operation of the Austin Black Plant, Sl
obtained the necessary prepared coal from its own Prep
Plant which had been extracted from the Slab Fork mine
three operational phases previously were inspected and
by MSHA. 2/ As noted below, VenBlack obtains its "uni
carefully selected and prepared coal from outside coal
through brokers.

---

ory pattern is not deemed re
nation to be made here must
on as it now exists rather th
uration in the past. MSHA's
ne recent past does indicate
on and permits the inference
convenient for it to continu
is, of course, but one of t

siness is the operation of the Austin Black plant where it nverts already prepared coal to the product known as Austin ack which it then bags and sells to the tire and rubber dustry which uses it as an additive, extender, and "chemical ller" in compounds used to make rubber (Tr. 57, 90, 97, 4-105). The coal purchased on the "outside" market (Tr. 89) rough Slab Fork and from other suppliers (Tr. 109, 110) by nBlack for this purpose mainly from the Maben Energy plants the Pocohontas Coal vein in West Virginia has already been epared by breaking, crushing, sizing, cleaning, washing, drying d mixing to an exact specification designated by VenBlack (Tr. -72). This coal has additional uniqueness since it must also (1) bituminous, and have chemical properites and be of a aracter common to only approximately 5% of the coals that are ailable (Tr. 120, 121, 133). Upon its arrival at VenBlack's ant, samples of this raw coal are first tested to insure that meets VenBlack's specifications, including those pertaining to emical composition (Tr. 85, 133, 134).

The prepared coal, which must be sized in particles of no re than half-inch, is delivered to VenBlack by a contract uler (Sullivan) who delivers it by truck (Tr. 23, 89, 110, 111) is first placed in a "truck bin" or raw coal storage silo. bsequently, it is transported through a network of conveyors r. 111) by conveyor belt and it finally ends up on a 1,000-ton lo where it is stored (Tr. 113). From the storage silo it is ansported by conveyor belt to a nearby tipple where it is cooped off the belt" and put into two small "tanks" or silos r. 113, 114).

From the two small silos the coal, of approximately the same lf-inch size as that delivered by Sullivan, is then run into e top of a six-story plant and down a chute into the "mill" r. 115-117). On the way it enters a "hammer mill" which sures that no particle exceeds the half-inch requirement. 3/ e coal then enters a unique (Tr. 117) air mill grinding process ich reduces the coal particles to a fine dust having the nsistency of talcum powder (Tr. 32, 118, 128) called Austin ack (Tr. 119). Once the small coal particles enter the inding stage high-pressure air "bangs" the particles against ch other in a closed system resulting in their reduction to wder (Tr. 32, 90, 117-119). This "unique" (Tr. 120) product is

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The hammer mill in effect "crushes" particles of coal which ceed half-inch down to suitable size. Approximately 10% of the al entering the process is reduced in size by this method (Tr. 2, 123).

trucks with fork lifts (Tr. 90).

VenBlack has only eight employees, including a fork operator, a wrapper, a bagger, a palletizer, a compressor supervisor, and a plant manager. Two employees in these occupations work at night and five work in the daytime. plant manager is the eighth employee.

VenBlack is classified by the State of West Virginia manufacturing company; coal mining has a different classi (Tr. 125-126). A competitor, Harwood Chemical, produces product (Kofil 500) similar to Austin Black and is regula OSHA. Harwood Chemical is located approximately 10 miles VenBlack (Tr. 101).

MSHA and the Occupational Safety and Health Administ both divisions of the Department of Labor have entered in agreement ("InterAgency Agreement") to delineate their au and jurisdiction. The InterAgency Agreement, 44 F.R. 228 (April 17, 1979), insofar as it relates to "milling," and from references pertinent to 1977 Mine Act provisions, pr

Mining and Milling:

Mining has been defined as the science, technique and business of mineral discovery an exploitation It entails such work as directed to the severance of minerals from the natural deposits by methods underground excavations, opencast work, quarrying hydraulicking and alluvial dredging. Minerals so cavated usually require upgrading processes to ei a separation of the valuable minerals from the ga constituents of the material mined. This latter cess is usually termed "milling" and is made up numerous procedures which are accomplished with through many types of equipment and techniques.

Milling is the art of treating the crude crust o earth to produce there from the primary consumer rivatives. The essential operation in all such cesses is separation of one or more valuable des constituents of the crude from the undesired con with which it is associated.

A Crude is any mixture of minerals in the form i it occurs in the earth's crust. An ORE is a sol taining valuable constituents in such amounts as

constitute a promise of possible profit in extraction, treatment, and sale. The valuable constituents of an ore are ordinarily called valuable minerals, or often just minerals; the associated worthless material is called gangue.

In some ores the mineral is in the chemical state in hich it is desired by primary consumers, e.g., graphite, sulphur, asbestos, talc, garnet. In fact, this is true of the majority of nonmetallic minerals. In metallic ores, however, the valuable minerals in their natural state are rarely the product desired by the consumer, and chemical treatment of such minerals is a necessary step in the process of beneficiation. The end products are usually the result of concentration by the methods of ore dressing (milling) followed by further concentration through metallurgical processes. The valuable produce of the oredressing treatment is called Concentrate; the discarded waste is Tailing.

(Emphasis supplied)

illing-MSHA Authority

Following is a list with general definitions of milling rocesses for which MSHA has authority to regulate subject to Paragraph B6 of the Agreement. Milling consists f one or more of the following processes: crushing, rinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat xpansion, retorting (mercury), leaching, and briquetting.

rushing

rushing is the process used to reduce the size of ined materials into smaller, relatively coarse articles. Crushing may be done in one or more stages, sually preparatory for the sequential stage of grinding, when concentration of ore is involved.

Grinding

Grinding is the process of reducing the size of a mined roduct into relatively fine particles.

Pulverizing

Pulver'zing is the process whereby m'ned products are

Washing

Washing is the process of cleaning mineral prod
by the buoyant action of flowing water.

Drying

Drying is the process of removing uncombined wa
from mineral products, ores, or concentrates, f
example, by the application of heat, in air-act
vacuum type filters, or by pressure type equipm

Pelletizing

Pelletizing is the process in which finely divi
material is rolled in a drum, cone, or on an in
disk so that the particles cling together and r
into small spherical pelletes. This process is
plicable to milling only when accomplished in r
to, and as an integral part of, other milling p
(Emphasis supplied.)

The health and safety hazards inherent in VenBlack
operation and the correlative enforcement objective of
described by Inspector Blevins as follows:

Well, the inherent hazard, or the inherent prob
with this type of an operation is they intentic
produce a 200 to 300 mesh product, and that in
is hard to control in transferring the material
different locations where it is to be processed
bagged for sale.

Q. So what is the enforcement problem there, i
is one, or condition that you are most concerne

A. Well, I deal with respirable dust, that's e
of the employees. I deal with accumulation to
explosive dust.

Q. What can happen there as far as that goes?

A. Well, when you deal with a real fine float
there is a hazard of explosions, which there is
on-going problem of Black Lung or the respirabl
that workers are exposed. (Tr. 25).

A. In view of (1) the list of milling processes contained in the Interagency Agreement, supra, and (2) the provision of Section 3(h)(1)(C) of the Act that all facilities "used in or to be used in the milling of such minerals, or the work of preparing coal or other minerals, and (including) custom coal preparation facilities" are within the Act's definition of "a coal or other mine," and since the Austin Black plant processes coal by milling (through crushing and pulverizing) in order to meet customer coal specifications or market specifications, the plant is a "coal mine."

B. There is no requirement that the operator of a "processing or preparation facility" must actually extract coal, nor is there a requirement that the coal be previously unprepared before it reaches a "secondary preparation facility" for the second facility to be considered a mine under the Act.

C. (1) Section 3(h)(1) of the Mine Act also provides that in making his determination of what constitutes mineral milling "the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment." (2) MSHA has demonstrated expertise in inspecting facilities similar to Austin Black, has executed a continuing enforcement presence at such facility, inspects several other mines and facilities in the area, and has an MSHA office in close proximity to the Austin Black plant.

D. The Occupational Safety and Health Act of 1970 is a residual statute when another federal agency has authority to regulate. Thus, Section 4(b)(1) thereof provides:

> Nothing in the Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or endorse standards or regulations affecting occupational safety and health.

II. VenBlack

A. VenBlack is a customer, consumer and purchaser only of coal already prepared to its specification, to be used in its manufacturing processes and the product delivered to its customers.

C. VenBlack, the same as the coking industry and utilities, is not a coal preparation facility, does not "produce" coal and should not be under the jurisdiction of MSHA.

D. The fact that MSHA previously inspected the facility of the Slab Fork Coal Company and the process carried on at its coal mine operation and preparation plant is not relevant because only manufacturing is performed by VenBlack.

DISCUSSION AND ULTIMATE FINDINGS AND CONCLUSIONS

Early on the Secretary anticipated that toward the end of the industrial chain as minerals move from extraction toward their destination in the commercial market-difficulty would be encountered in the classification of certain firms as mining (including milling and coal preparation facilities), manufacturing, or the ultimate consumer. 4/ In the instant proceeding the Secretary has effectively shown that MSHA's regulation of VenBlack would be both convenient and expert. On the other hand, the record does not indicate that OSHA regulation thereof would be inconvenient or lacking in expertise. Indeed, OSHA regulates a nearby competitor, Harwood Chemical, which produces a product similar to Austin Black, and coking plants handling a similar type of coal (Tr. 101-103). Consequently, I do not find this factor to tilt the scales one way or the other.

During the hearing and in its post-hearing brief, the Secretary also expressed the view that the mere engagement of a business enterprise in any of the mechanical functions, i.e., "processes" listed in the Interagency Agreement under the heading

4/ Paragraph B(3) of the InterAgency Agreement states:

> "Appendix A provides more detailed descriptions of the kinds of operations included in mining and milling and the kinds of ancillary operations over which OSHA has authority. Notwithstanding the clarification of authority provided by Appendix A, there will remain areas of uncertainty regarding the application of the Mine Act, especially in operations near the termination of the milling cycle and the beginning of the manufacturing cycle."

that it is mixed, crushed, sized, or pulverized. This contenti is found to be without merit.

There is no question but that VenBlack performs several of the listed processes on coal incidental to its business purpose of converting it, by unique mechanical means from the select, highly prepared raw material it purchases from the coal industry to its final commercial product which is considered a chemical additive in the tire and rubber industry. However, the InterAgency Agreement provides a prerequisite characteristic to any listed process being considered "milling," i.e., that such process bring about "separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." (Thus, under the Agreement, "mining" i not a general engineering or industrial term, but is instead vested with a specific meaning.) Such is clearly not the case with respect to VenBlack's machine, the unique air mill grinding process described herein above 5/ which pulverizes but does not "separate" desired constituents from contanimants. Any such "separation" has previously taken place in the coal preparation plants, VenBlack's suppliers. It is manifest from the portion of the Agreement quoted above that while processes such as crushing, pulverizing, sizing, and storing, can be milling, they are not as the Secretary contends, automatically illing and thus in the regulatory domain of MSHA.

It is ultimately concluded that VenBlack is engaged in manufacturing operations and that the position of the Secretary that VenBlack is a secondary coal preparation facility is not meritorious. The Federal Mine Safety and Health Review Commission noted in its decision in Oliver M. Elam, Jr., 4 FMSHR 5 (1982) that the 1977 Mine Act's definition of "coal preparation" was taken from section 3(i) of the 1969 Coal Act, 30 U.S.C. § 802(i)(1976), which definition in turn was updated from the 1952 Coal Act. The Commission stated:

5/ Although referred to as a "grinding" process, the unique machine which performs this operation more precisely "pulverizes the raw material-as that term is defined in the InterAgency Agreement-since the product emerges with the consistency of a fine powder.

> done by the operator.' Thus, inherent in the determination of whether an operation properly is classified as 'mining' is an inquiry not only into whether the operation performs one or more of the listed work activities, but also into the nature of the operation performing such activities. In Elam's operations, simply because it in some manner handles coal does not mean that it automatically is a 'mine' subject to the Act."
>
> (Emphasis added.)

Any incisive inquiry into the "nature" of VenBlack's operation seemingly must resolve the fundamental question of whether it is producing coal--in this instance through the process of milling it or "preparing" it--or is manufacturing a separate, distinguishable product.

Three preliminary observations concerning VenBlack and its product serve to shed some light on this question. First, although the Secretary with some creativity contends that VenBlack is a "secondary" coal preparation facility, it is established in the record that the coal pieces purchased by VenBlack for its manufacturing purposes have already been carefully and extensively prepared (by breaking, crushing, sizing, cleaning, washing, drying and mixing to an exact specification) having first been carefully selected for its chemical compositi Secondly, it is noted that VenBlack's operation is two steps removed from the coal mine operations which extracted the coal, and one step removed from the remarkably detailed process at a preparation facility. Finally, after going through VenBlack's pulverizing process, this raw material has lost its "mineral" identity as coal, having become a separate, distinguishable product having an entirely different identity and commercial purpose--as an additive and filler from the already refined mineral raw material unloaded by Sullivan. Other than from the exercise of tracing its origin, it no longer is identifiable as coal. 6/

6/ These are three of the bases upon which it is concluded tha the VenBlack operation is to be distinguished from the "slate gravel processing facility" found to be a mine in Donovan v. Carolina Stalite Company, 734 F.2 1547 (D.C. Cir., 1984), which is discussed further subsequently.

coal preparation facility, pointed out that Alexander Brothers (which was engaged in reclamation activities) did not dispute that it undertook its processes (crushing, sizing, storing, crushing, etc.) in order to make coal-bearing refuse marketable "as coal." In contrast, it is clear that VenBlack undertakes manufacturing processes in order to make already extracted, already prepared, coal pieces into a distinct and unique produc for marketing as a chemical additive-not as coal.

As the United States Court of Appeals for the District of Columbia Circuit points out in Carolina Stalite, supra, every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h); the jurisdictional line rests upon the distinction betwee milling and preparation, on the one hand, and manufacturing on the other; classification as the former carries with it Mine Ac coverage; classification as the latter results in Occupational Safety and Health Act regulation.

Superficially, Carolina Stalite seems to support the Secretary's position since the slate and gravel processing facility owned and operated by the company was found to be a "mine". However, close examination of the Court's decision therein raises various grounds for differentiation between Carolina Stalite's business operation and that of VenBlack. Carolina Stalite's "slate gravel processing facility" was situated on property in North Carolina immediately adjacent to quarry owned and operated by another independent corporation, Young Stone Company. Approximately 30% of the stone quarried b Young was delivered to Carolina Stalite by means of conveyor systems owned, operated and maintained by Young which was regu- lated by MSHA. Carolina Stalite then "bloated" the slate in a rotary kiln with intense heat, creating a light-weight material called "stalite" (its unregistered trade name) which was then crushed and sized and sold by Carolina Stalite for use in makir concrete masonary blocks. In disagreeing with the Commission's conclusion that Carolina Stalite was engaged in manufacturing rather than mining 7/ the Court delivered the primary thrust of its rationale in the following language:

7/ The Court determined that the Commission had incorrectly he that the Act required a company actually to extract a mineral before being subject to Mine Act jurisdiction.

> ...first to characterize the Stalite facility as ... the physical proximity and operational integra... Carolina Stalite and Young Stone, whose plant ... questionably subject to the Act, permit those ... to be viewed, in industrial and econo... reali... distinct from questions of legal title to the ... as a unified mineral processing operation. Th... sideration makes less artificial the statute's ... classification of Carolina Stalite's facility ...
>
> (Emphasis added)

By comparison, VenBlack can in no sense be viewed ... unified mineral processing operation" with the operato... extract its coal from the ground. Nor can it similarl... as unified mineral processing operation with the coal ... plants which thereafter prepared its coal.

The following chart to some extent depicts the di... tinguishing features distinguishing VenBlack from Caro... Stalite.

CAROLINA STALITE

1. Extraction: Carolina Stalite and Young Stone ... seen as a "unified" slate gravel processing facil... physically contiguous premises with Young doing t... extracting and delivery to Stalite, which mills t... mineral. Young is already regulated by MSHA.

2. Delivery: Carolina Stalite's unrefined minera... delivered to it for processing by Young's conveyo... of a unified, integrated slate gravel operation.

3. Process Performed on the Mineral: Heat expansion, crushing, ...

4. Identity of original Mineral after Processing: Essentially the sam... original mineral extracted.

5. End use of Product: Stalite is used in the ma... of concrete blocks.

1. Extraction: VenBlack is not unified, physically contiguous, or operationally integrated with any mine operator engaged in extraction whether or not such is regulated by MSHA. After extraction, the original mineral is subjected to exhaustive preparation by

2. Independently owned and Operated Preparation Plants: VenBlack is not unified, physically contiguous, or operationally integrated with an mine operator engaged in mineral preparation whether or no such is regulated by MSHA.

3. Delivery: VenBlack's highly-prepared mineral raw material is delivered to it by an independent hauler.

4. Process Performed on Original Mineral: Sampling for chemical composition, storage, sizing (by crushing), pulverizing, and bagging.

5. Identity of Original Mineral after processing: Austin Black is no longer coal, having become a separate chemical product.

6. End use of Product: As a chemical additive and filler the tire and rubber industry. 8/

The Court in Carolina Stalite made a final point with respect to the determination of covered mine activity which mus be considered:

> "Because the Act was intended to establish a "single mine safety and health law, applicable to all mining activity," S.Rep No. 461, 95th Cong., 1st Sess. 37 (1977)(emphasis added), its jurisdictional bases were expanded accordingly to reach not only the "areas ... from which minerals are extracted," but also the "structures ... which are used or are to be used in ... the preparation of the extracted minerals." S.Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), U.S.Code Cong. & Admin. News 1977, 3401, 3414. See also S.Rep. No.

8/ It might be said of stalite's relationship to the original mineral that "a rose is a rose by any other name," whereas Aust Black has become perfume.

th[e] Act." S.Rep. No. 181 supra, at 14, U.S.Code C
& Admin. News 1976, at 3414."

The question thus remains whether VenBlack's surface facilities and structures are used in preparing or processi minerals. It is concluded that inherent in the determinati that a process is "preparing" or "processing" (milling) mir is the proposition that at the end of the preparation or pr cessing there must still remain a distinguishable mineral f for marketing and sale as such mineral. This is one of the salient factors differentiating manufacturing from milling/preparing. If the mineral substantially loses its original identity in such process or preparation and a sepa unique, clearly identifiable product emerges for sale and marketing, then it would seem that the operation involved i manufacturing rather than mining. In other words, the natu the business operation must be discerned and the retention mineral identity at the end of the processing is necessary conclusion that the operation is engaged in mineral prepara or mineral milling. Otherwise, the mere performance of any the mechanical processes listed in the InterAgency Agreemer any mineral would "automatically" be construed as mining ac rather than manufacturing.

Here, it is clear that VenBlack is not an integral par unified extraction/mineral processing operation the extract part of which is already regulated by MSHA; the "convenienc administration" factor does not weigh against either MSHA c regulation; the original mineral processed by VenBlack has, completion of such process, lost its original identity and, economic reality, given way to a new product.

This proceeding involves difficult issues and the posi of the parties both have some merit in the present stage of development of the law on the subject. The Congressional m to generously extend MSHA's jurisdiction over questionable enterprises is clear. Old Dominion Power Company, 6 FMSHRC (1984), at 1890. Nevertheless, accepting the Secretary's c jurisdictional guidelines and upon careful consideration of nature of VenBlack's operation and other relevant determina have concluded that it is engaged in manufacturing a separa chemical product rather than producing (milling or preparat coal. The position advanced by VenBlack is accepted as hav the greater merit.

pressly incorporated in this decision are rejected.

VenBlack's contest of Citation No. 2124861 on the basis of ck of regulatory jurisdiction having been found meritorious, e subject Citation is vacated.

On the same basis, the remaining 7 Citations involved in nalty Docket WEVA 84-313 are vacated, and that proceeding is smissed.

Michael A. Lasher, Jr.
Administrative Law Judge

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lc

ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 85- A.C. No. 48-00152-0
v.	:	FMC Trona Mine
FMC WYOMING CORPORATION, Respondent	:	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the S U.S. Department of Labor, Denver, Colora for Petitioner;
John A. Snow, Esq., and James A. Holtkam VanCott, Bagley, Cornwall & McCarthy Salt Lake City, Utah, for Respondent.

Before: Judge Lasher

Upon Petitioner's written motion for approval of settlement on the record on March 7, 1985, in Salt La Utah, and the same appearing proper and in the full a initial assessment, the settlement which was approved bench during proceedings involving Respondent, is her

Respondent, if it has not previously done so, is pay to the Secretary of Labor within 30 days from the the sum of $168.00.

Michael A. Lasher, Jr.
Administrative Law Judge

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/blc

ND L. COPELAND, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. SE 84-48-DM MD 83-53
CO MINING COMPANY, Respondent	:	

DECISION

arances: Raymond L. Copeland, Lakeland, Florida, pro se;
Mary A. Lau, Esq., Holland & Knight, P.A., Tampa, Florida,
for Respondent.

re: Judge Lasher

This proceeding, which was initiated by the filing with the ral Mine Safety and Health Review Commission of a complaint iscrimination by Raymond L. Copeland (herein "Complainant") pril 12, 1984, arises under section 105(c) of the Federal Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., & Supp. V 1981), hereinafter "the Act."

Complainant was previously notified by letter dated March 6, from the Mine Safety and Health Administration (MSHA) that complaint of discrimination with it had been investigated and determination made that a violation of section 105(c) of the had not occurred.

The matter came on for hearing in Lakeland, Florida, on mber 7, 1984, at which Respondent was represented by counsel Complainant appeared pro se.

PRELIMINARY FINDINGS

The Complainant was discharged on June 3, 1983, pursuant to otice of Disciplinary Action" (Exhibit R-4) which specified:

> "Insubordination: Refuse to do flagperson work, instructed by the shift supervisor."

observing the track and the train when the train is in
and bleeding air off cars by pulling levers (Tr. 41-42,
176-177, 182, Ex. C-1). At all times material herein,
Complainant's immediate supervisor was Robert B. Durden,
foreman in the transportation department (sometimes refe
as a "dispatcher") (Tr. 41, 173-175).

Article XV, Section 9, of the Agreement between Res
and the International Chemical Workers Union (herein "Un
which Complainant is a member provides:

> "Except where to do so would place them or other
> in a real and present danger of serious bodily h
> or cause them to violate the criminal laws of th
> State or Nation, the employees will obey the dir
> and orders of their supervisors. If the directi
> orders cause a violation of the terms of this ag
> the employee can subsequently, after carrying ou
> directive, resort to the grievance procedure for
> Subject to the foregoing, refusal to obey such d
> directives of a supervisor will result in discha
> other disciplinary action." (Ex. R-1).

In 1976, Complainant was terminated from employment
Respondent because of insubordination (Tr. 148). In the
of processing a grievance filed by the Union protesting
discharge, the Union and Respondent reached a settlement
the penalty from discharge to a six-month suspension (Tr
That settlement was expressly conditioned upon Complaina
execution of a letter agreeing that he would be subject
immediate and permanent discharge if he was "ever again
ordinate or threatening" to his supervisors (R-3). This
settlement was in effect at the time of Complainant's te
for insubordination on June 3, 1983 (Tr. 149).

On May 31, 1983, Complainant was to work as a flagm
third shift, from 11:00 p.m. to 7:00 a.m. (on June 1),
train crew comprised of himself, locomotive engineer, Ed
Francis and flagman William Cheeseman (Tr. 186) under t
supervision of foreman Durden.[1]/ At the beginning of t
the crew received instructions from Durden which includ
a train of cars to the dumping area to unload, moving t

1/ Complainant and Francis are black and Cheeseman and
are white.

some cars to a repair area to be repaired (Tr. 73, 188-189). While Francis and Complainant were completing that assignment Cheeseman returned to the dispatcher's office (Tr. 190, 258). Durden informed Cheeseman that he wanted Cheesman and Complainant Copeland to ride in a truck to an area called the "two-mile post", located approximately 400 yards from the off to check the bottom of the rail car doors and to bleed the ai off the rotary dump cars on Track 4 (Tr. 76, 191-258). Complainant had performed both these functions previously at night (Tr. 177-178; Ex. R-6 at pg. 14).

Durden and Cheeseman then left the dispatcher's office a met Complainant at the bottom of the stairs outside the offic his way back from the train area (Tr. 192). Durden repeated Copeland, "Raymond, I want you and Cheeseman to go to the two-mile post to check the bottom doors and bleed the air off rotary dumps." Complainant replied that he was not going to two-mile post to check the bottom doors and bleed the air and told Durden that if that was all Durden had for him to do, to him for his time up to that point and he would "go in" (Tr. 7 192-196, 256). Durden repeated the instruction and asked Complainant if he was refusing to do the assigned work (Tr. 1 256). At that point Complainant stated for the first time th he wouldn't do the assigned work because it was unsafe unless could use a radar light rather than the customary flagman's lantern (Tr. 70, 193, 224, 256; Ex. R-6, pg. 9). Durden advi Complainant that he did not have an available radar light and could not get one because the storeroom was closed (Tr. 109, Durden asked Cheeseman if the work was unsafe to perform with a radar light and Cheeseman stated that it was not unsafe (Tr 197, 256, Ex. R-6, pg. 9). Both Cheeseman and Complainant ha flagman's lanterns which were in working order at the time Du gave the assignment to go to the two-mile post (Tr. 76, 133, 197).

Complainant then suggested that the crew move the train a different well-lighted area of the yard (Tr. 84), a procedu which had never been used for checking doors and bleeding air cars at the two-mile post (Tr. 196). When Durden rejected Copeland's suggestion, Copeland said that he would not go to two-mile post (Tr. 196). At that point, Durden suspended Copeland for insubordination pending further investigation to determine appropriate discipline, including possible discharg (Tr. 85, 200).

both in the darkened hearing room and at the [illegible] itself revealed that the flagman's lantern, which Comp refused to use, is at least equal in lighting capacit suitability for the tasks to have been performed, and respects, superior to the radar light Complainant ins using but which was not available (Tr. 135-140, 287, 297, 298).

Respondent has promulgated a manual containing s for engineers and flagpersons in its transportation d (Ex. C-2). A list of safety equipment required to be cared for by flagpersons in the performance of their appears at page 12 thereof, and includes - in additio items as safety hat and safety glasses - a "flagman's

On October 14, 1983, Complainant filed charges w Equal Employment Opportunity Commission and the Flori Commission on Human Rights alleging that his discharg race (Exs. R-6, R-7. and R-8).

Complainant also filed a grievance pursuant to A the Agreement between the Respondent and the Union (E June 3, 1983. The Report of Arbitrator George V. Eyr was issued on March 26, 1984, determining that the Un to show that Complainant's discharge was due to safet (Ex. R-6).

Had Complainant been given a radar light he would refused to perform the work assigned him by Durden at mately 4:30 a.m. on June 1, 1983 (Tr. 110).

Complainant testified that he had never previous radar light or flagman's lantern to close car doors felt that "it's (the radar light) indicating more li flagman's lantern" (Tr. 100, 125). 2/ He also felt t flagman's lantern was "unsafe for that type of job" (

2/ Complainant failed to establish any persuasive ba record why he thought the radar light put out more l flagman's lantern. Also, Arbitrator Eyraud found tha himself established he had indeed previously performe duties assigned by Durden on June 1, and without a ra

performed (Tr. 68, 69, 84, 96, 97, 112, 113, 114, 115), and 2) dissatisfaction with Durden's actions which made it seem as though Cheeseman was in charge even though Cheeseman, according to Complainant, "had just come there" and "had just started working in the department" (Tr. 115, 116). Complainant's reaction to this and possibly other wrongs perceived by him was to test Durden to see how much Durden "cared about safety" by raising the issue of lighting (Tr. 115, 116, 133).

The jobs of checking doors and bleeding the air off rotary pumps, when done after dark, typically were done by flagmen using flagman's lanterns (Tr. 177-178, Ex. R-6). No complaints that these two jobs were unsafe to perform at night had been received prior to the night of Copeland's suspension (Tr. 178, 232-236). There was no evidence that Copeland or anyone else ever complained about the safety of those two jobs using a flagman's lantern instead of a radar light, prior to the night of May 31 - June 1, 1983 (Tr. 236).

ULTIMATE FINDINGS AND CONCLUSIONS

The Complainant has established no justification whatsoever for his contention that the flagman's lantern (a) was inferior to the radar light, or (b) was insufficient for the job he had been instructed to perform. Indeed, the record in this case in fact actually establishes that the flagman's lantern is somewhat superior to the radar light which Complainant insisted on using as a condition of performing his assigned tasks. It was therefore clearly unreasonable for Complainant to engage in a work refusal since he has admitted that he would not have refused to work had he been given a radar light. This conclusion is further supported by the fact that the Complainant's real complaint was not safety-related but resulted from a perceived slight - justified or not.

In view of the foregoing, and since it is also clear that Complainant did not raise a safety issue until after his foreman had asked him if he was refusing a direct order, it is also concluded that Complainant did not entertain a good faith belief that a hazardous condition existed. His sudden assertion on the night of May 31, June 1, 1983, after ten year's experience as a flagman, that a hazardous condition existed because of the inadequacy of the flagman's lantern was not a genuine safety complaint.

Under the analytical guidelines established in Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (198

A miner's work refusal is a protected activity u
Mine Act if the miner has a reasonable, good faith be
hazardous condition. Secretary on behalf of Pasula v
dation Coal Co., supra; Secretary on behalf of Robine
United Castle Coal Co., supra. See also Miller v. FM
F.2d 194 (7th Cir. 1982).

Here, the Complainant's work refusal, being base
a good faith belief, or a reasonable belief, in the e
a hazardous condition, was not a protected activity u
1977 Mine Act. Accordingly, there is no remedy for h
under this Act.

ORDER

Complainant having failed to establish Mine Act
nation on the part of Respondent, his complaint herei
DISMISSED.

Michael A. Lasher, Jr.
Administrative Law Judge

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/blc

APR 15 1985

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 84-296-R
v.	:	Citation No. 2420016; 6/19
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Martinka No. 1 Mine

SUMMARY DECISION

Before: Judge Steffey

Counsel for the Secretary of Labor filed on December 7, 1984, in the above-entitled proceeding a "Motion for Partial Summary Judgment". Counsel for Southern Ohio Coal Company filed on December 24, 1984, a cross motion for summary decision.

Because I was in doubt as to certain procedural aspects of the parties' motion and cross motion, I issued an order on February 7, 1985, requesting that they clarify those points. The Secretary's reply to that order was filed on February 27, 1985, and explains that the word "partial" used in the title of the motion simply means that the Secretary is not requesting me to rule on any issues at this time which may later be raised with respect to the imposition of a civil penalty when and if the Secretary subsequently files a related civil penalty case with respect to Citation No. 2420016 which is the subject of SOCCO's notice of contest in this proceeding.

SOCCO filed its reply to my order on February 28, 1985. Both the Secretary's reply to the order and SOCCO's reply to the order state unequivocally that no genuine issues of material fact remain to be adduced beyond those which have been submitted by the parties in the form of replies to interrogatories and the depositions taken of three persons by SOCCO's counsel on September 20, 1984. SOCCO's reply (p. 2) to the order also states that to the extent that I encounter discrepancies in the information submitted by the parties, it will be necessary for me to "make factual conclusions base on the information in the file." The parties' replies to my order make it clear that they are requesting that I issue a summary decision pursuant to 29 C.F.R. § 2700.64.

Findings of Fact

1. Jesse Lowell Satterfield lives in Fairm
Virginia (Dep. 4). 1/ He gave a deposition on S
1984. At that time he had been unemployed for 3
prior to that, he had worked for Consolidation C
various capacities from 1973 to 1984 (Dep. 6).
member of the United Mine Workers of America sin
is financial secretary of Local 4060 and was cha
mine safety committee from 1982 to 1984 (Dep. 8)
often accompanied MSHA inspectors while they wer
Consolidation Coal Company's Mine No. 20 where S
worked (Dep. 39; 70). Satterfield graduated fro
and lacks only one semester of having graduated
State College (Dep. 6). Satterfield's experienc
miner resulted in his becoming acquainted with t
health and safety standards and with several ins
ployed by the Mine Safety and Health Administrat

2. Satterfield is 35 years old and has alw
Fairmont (Dep. 4). At the present time he lives
owned by his mother and his mother lives in anot
houses which is located only a short distance fr
occupied by Satterfield (Dep. 36; 49; Exh. 1).
peared in the road about 1/4 mile from Satterfie
(Dep. 10). People were observed checking the fo
homes in the area where Satterfield lives and Sa
assumed that the persons doing the checking were
Southern Ohio Coal Company (SOCCO). Property ow
area expressed the belief that SOCCO's Martinka
under their homes and Satterfield's mother asked
out where SOCCO was mining (Dep. 10-12).

3. Satterfield believed that SOCCO was req
Federal Mine Safety and Health Act of 1977 to ma
map available for inspection by interested perso
person living on the surface of the mine, he did
SOCCO any prior notice of his wish to see the ma
believed that SOCCO was under a legal obligatio

1/ Depositions of Jesse Lowell Satterfield, Fra
Bowers, and Raymond Leon Ash were taken by SOCC
September 20, 1984. All references are to page
sitions given by those three persons. The depo
transcribed and placed in a single volume havin
page numbers.

tion polls on June 5, 1984. About midday he was told that he could take 3 or 4 hours off because few persons were coming to the polls to vote at that time (Dep. 9).

4. Satterfield went to SOCCO's Martinka Mine about 1 p.m. on June 5, 1984, and was admitted by the guard to mine property after he had told the guard that he wanted to see the mine map. Satterfield then went to the mine office and told the receptionist that he wanted to see the mine map so as to determine whether SOCCO was mining near his house (Dep. 15). She made a phone call and advised Satterfield that John Riley, SOCCO's land manager, was not at the mine at that time and that he was the only person who could show him the map. Satterfield told the receptionist that he had come to the mine to see the map, not John Riley (Dep. 16). About that time, Satterfield saw an MSHA inspector named Wayne Fetty with whom he was personally acquainted. Satterfield explained to Fetty that he was having a problem because he had come to see the mine map and it looked as if no one would show it to him. Fetty suggested that Satterfield see someone else (Dep. 17). Lud Gowers, an employee in SOCCO's safety department, overheard Satterfield's remarks and volunteered to check in the Engineering Department to see if someone else might be able to show Satterfield the mine map. When Gowers returned, he stated that John Riley was the only person who could show Satterfield the map. Satterfield thereafter told the receptionist, whom he had known for several years, that SOCCO would be in violation of the Act for refusing to allow him to see the mine map (Dep. 18). The receptionist again stated that only John Riley could show him the map (Dep. 19).

5. Satterfield returned to his home about 2 p.m. on June 5, 1984. He then called Ron Keaton at MSHA's Morgantown Office and Keaton read some of the Mine Act to him and confirmed Satterfield's belief that SOCCO was obligated to show him the mine map. Keaton advised Satterfield that an MSHA inspector could be made available to meet Satterfield at the mine to assure that he would be shown the map, but Satterfield said he would try again to see the map without resorting to asking MSHA for assistance (Dep. 20). Satterfield thereafter called the receptionist at the mine and told her that he had checked with MSHA and that he was correct in stating that SOCCO was legally obligated to show him the mine map. The receptionist connected Satterfield with Wesley Hough in SOCCO's Engineering Department. Hough stated that since Satterfield had to work at the polls until late that day, he would get John Riley to show Satterfield the mine map at 7:30 p.m. (Dep. 21).

stated that he had arranged for SOCCO's personnel to set meeting so that the matter could be taken care of (Dep. 6 Bowers then engaged in conversations with Mike Resetar in SOCCO's Safety Department and Resetar talked to Jim Tompk and John Merrifield who are mine officials (Dep. 62; 96). Bowers had great difficulty in getting SOCCO's personnel agree upon a time when Satterfield could see the mine map (Dep. 63). SOCCO finally agreed to have someone show Sat field the mine map at 7:30 p.m. the next day, June 20.

12. Bowers had decided to issue a citation for SOCC refusal to show the mine map to Satterfield on June 5, bu Bowers did not actually issue the citation until after a for seeing the map had been agreed upon (Dep. 65). Bower said that his decision to issue the citation was based on fact that Satterfield had been to the mine on June 5 at 1 to see the map and no one would show it to him. Then whe time of 7:30 p.m. was agreed upon for Satterfield to see map on that same day, no one would show Satterfield the m The citation Bowers wrote is No. 2420016, and was issued June 19, 1984, at 10 p.m. under section 104(a) of the Act leging that SOCCO had violated section 312(b) of the Act. The condition or practice described in the citation reads follows:

> According to Lowell Satterfield, a landowner on the surface of the Martinka No. 1 Mine, a request was made on June 5, 1984, to see the mine map. A meeting was set to see the map at 7:30 p.m. on June 5, 1984, with a company official, and no one would show him the map after 5 p.m.
>
> A meeting has now been set with the Company and Lowell Satterfield for 7:30 p.m. on June 20, 1984, at the mine. The time set for the meeting is agreeable with both parties.

Bowers Deposition Exh. 1. Citation No. 2420016 was modif on August 24, 1984, to cite 30 C.F.R. § 75.1203 which is tical in wording with section 312(b) of the Act. The mod cation was made because MSHA's computers are programmed t reject any citation which reflects a violation of a secti of the Act if there is a parallel regulation pertaining t the violation being charged (Dep. 77; Bowers Deposition E

13. The deposition given by Raymond Ash, the MSHA s visory inspector to whom Satterfield appealed for assista in getting SOCCO to show him the mine map, does not disag with the facts given by Bowers or Satterfield in any sign cant particulars. Ash's deposition is useful, however, i

that SOCCO was not going to show their maps or anything else to people except by appointment during normal working hours between 8 a.m. and 4:30 p.m. Riley said that SOCCO is a business just like a courthouse is a business and should be open only during normal working hours (Dep. 105). Ash also said that John Merrifield had told him essentially the same thing about June 19 when he was engaged in conversations with SOCCO personnel about getting SOCCO to show Satterfield the mine ma (Dep. 108).

14. Ash's deposition also seems to support Satterfield' belief that he went to SOCCO's mine on June 19 about 7:00 p.m because Ash thinks that Satterfield first called him about 8 p.m. after Satterfield had already been to the mine and had been refused admittance (Dep. 100).

Consideration of Parties' Arguments

The arguments in the Secretary's motion for summary decision are straight forward and to the point. The Secretary relies upon the literal meaning of the words of section 312(b of the Act, or of section 75.1203 of the regulations which ar identical with those of section 312(b), and asserts that sinc Satterfield was a person owning, leasing, or residing on the surface area of SOCCO's mine, that he was a person who is entitled to inspect the map. The Secretary then concludes that since SOCCO failed to make the map available to Satterfield when he went to the mine about 1 p.m. on June 5, 1984, and asked to see the map, SOCCO was necessarily in violation of section 75.1203 and that the inspector correctly issued Citation No. 2420016 on June 19, 1984, alleging that SOCCO had violated section 75.1203 (Secy's Motion, pp. 4-8).

SOCCO's cross motion for summary decision concedes that Satterfield was not shown the mine map on June 5 when he went to the mine to see the map, but SOCCO seeks to avoid being cited for a violation of section 75.1203 by arguing that SOCCO had a policy of showing the map to the persons designated in section 75.1203 so long as they ask to see the map during SOCCO's normal business hours of 8 a.m. to 4:30 p.m. and so long as they assure, in advance of coming to see the map, that John Riley, SOCCO's land manager, is also at the mine to show such persons the map. SOCCO argues that at no time did it refuse to make the map available to Satterfield and only insisted that Satterfield come to see the map during normal business hours, or come at some other time when John Riley was willing to show the map to Satterfield. SOCCO states that it is unreasonable for Satterfield or the Secreta

that he would not go to the mine that late to show the mine map and that Satterfield could see the ma mine between 8 a.m. and 4:30 p.m., but Satterfield he worked the day shift and could not come to the 8 a.m. and 4:30 p.m. Riley then volunteered to co before the day shift started, but Satterfield said had to leave for work at 6:30 a.m. and could not c mine before work. Satterfield also noted that he been to the mine between the hours of 8 a.m. and 4 and had not been able to see the map at that time Satterfield worked 2 hours overtime about 8 days o did not leave the mine until 6 p.m. Satterfield a on Saturday and some Sundays. Satterfield said th not work overtime, he could leave the mine at 4:30 be at SOCCO's mine by 5:30 p.m. because it takes h to drive home, but Riley declined to stay an hour show him the map. Satterfield's conversation with sulted in an impasse because Riley was unwilling t much as 1 hour late to show the map and Satterfiel come to the mine before 8 a.m. or during normal wo extending from 8 a.m. to 4:30 p.m. (Dep. 23-24).

7. After Satterfield had failed to reach an with Riley as to a time when he could see the mine terfield called an MSHA supervisor of inspectors r Ash at his home and told him about his previous di with Ron Keaton mentioned in Finding No. 5 above a Satterfield that he would have another inspector, check into the matter. Several days thereafter, S was told by an inspector named Homer Delovich at C mine where Satterfield was employed that Workman h to him that SOCCO would make available to Satterfi formation he needed (Dep. 28-29).

8. Relying on Delovich's statements, Satterf went to SOCCO's mine about 7 p.m. on June 19, 1984 Satterfield told the guard at SOCCO's mine that he see the mine map, the guard called someone on the then advised Satterfield that John Riley was not o property. Thereafter, the guard called Riley on t and Satterfield had another conversation with Rile again resulted in no agreement as to a time when S could see the mine map without having to come to t tween the hours of 8 a.m. and 4:30 p.m. (Dep. 26-2 field asked the guard if there was an MSHA inspect property and the guard checked and found that an M spector named Frank Bowers was at the mine. Satte plained to Bowers the difficulties he had had in t

that he was not familiar with the problem and suggested that Satterfield discuss the matter with some of the inspectors whose help he had previously sought (Dep. 32-33).

9. After Satterfield had returned home on June 19 without being able to see the map, he again called Raymond Ash at home to inform him of his most recent unsuccessful efforts to see the mine map. Satterfield's call to Ash resulted in several other phone calls involving Frank Bowers, who was the MSHA inspector on mine property at that time, and Mike Resetar a SOCCO employee who worked in SOCCO's Safety Department. Subsequently, Resetar called Satterfield to tell him that he was checking to see if someone would be available the next day to show Satterfield the map. Bowers then called Satterfield and told him to be at the mine at 7 p.m. the next day, June 20 and someone would show him the map (Dep. 34).

10. When Satterfield went to the mine on June 20, John Riley was near the gate with the map and other persons present were the security guard, Mike Resetar, Frank Bowers, and the UMWA walk-around representative, Henry Metz (Dep. 55). Riley laid the map on the hood of a pickup truck and pointed to two little squares on the map which had been placed there to indicate the location of his home and the house in which his mother lives. Riley would not answer any other question which Satterfield asked him, such as inquiries about the location on the map of a church, a new air shaft, and projection of the longwall panel. Satterfield subsequently discussed what he had seen on the map with his mother. Other people who live in the area or travel the road have asked him whether the longwall had mined under his house and he told them that SOCCO had mined under his house, but not with the longwall. One of Satterfield's neighbor's told him that a SOCCO official had contacted him and that he believed his house would be on the surface above SOCCO's next mining panel (Dep. 37-38).

11. As indicated in Finding No. 8 above, Frank D. Bowers is the MSHA inspector who was present at SOCCO's mine on June 19, 1984, when Satterfield came to the mine for the second time and was unsuccessful in being shown the mine map (Dep. 57; 59). Bowers talked to Satterfield on the phone after the guard refused to allow Satterfield to go on mine property. Satterfield wanted Bowers to issue a citation for SOCCO's refusal to show him the mine map, but Bowers declined to do so until he had obtained additional information. Satterfield became angry and hung up and Bowers "sort of forgot" (Dep. 59) the matter until he received a call from Ash, his supervisor, who told him to check into the map situation and

stated that he had arranged for SOCCO's personnel to meeting so that the matter could be taken care of (D Bowers then engaged in conversations with Mike Reset SOCCO's Safety Department and Resetar talked to Jim and John Merrifield who are mine officials (Dep. 62; Bowers had great difficulty in getting SOCCO's perso agree upon a time when Satterfield could see the mir (Dep. 63). SOCCO finally agreed to have someone sho field the mine map at 7:30 p.m. the next day, June 2

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SOCCO's cross motion for summary decision concedes that tterfield was not shown the mine map on June 5 when he went the mine to see the map, but SOCCO seeks to avoid being ted for a violation of section 75.1203 by arguing that CCO had a policy of showing the map to the persons desig- ted in section 75.1203 so long as they ask to see the map ring SOCCO's normal business hours of 8 a.m. to 4:30 p.m. d so long as they assure, in advance of coming to see the , that John Riley, SOCCO's land manager, is also at the ne to show such persons the map. SOCCO argues that at no me did it refuse to make the map available to Satterfield d only insisted that Satterfield come to see the map during rmal business hours, or come at some other time when John ley was willing to show the map to Satterfield. SOCCO ates that it is unreasonable for Satterfield or the Secretary

Section 312(b) of the Act and section 75.1203 pro
follows:

> The coal mine map and any revision and suppl
> ment thereof shall be available for inspection by
> the Secretary or his authorized representative, b
> coal mine inspectors of the State in which the mi
> is located, by miners in the mine and their repre
> sentatives and by operators of adjacent coal mine
> and by persons owning, leasing, or residing on su
> face areas of such mines or areas adjacent to suc
> mines. The operator shall furnish to the Secreta
> or his authorized representative and to the Secre
> tary of Housing and Urban Development, upon reque
> one or more copies of such map and any revision a
> supplement thereof. Such map or revision and sup
> plement thereof shall be kept confidential and it
> contents shall not be divulged to any other perso
> except to the extent necessary to carry out the
> provisions of this Act and in connection with the
> functions and responsibilities of the Secretary o
> Housing and Urban Development.

Legislative History

The Secretary's motion (p. 7) states that there
legislative history pertaining to section 312(b) of t
but that is not entirely correct. Section 312(b) was
changed when the Federal Coal Mine Health and Safety
1969 was amended and renamed the Federal Mine Safety
Act of 1977. Therefore, the legislative history perta
section 312(b) is contained in Part 1 of the LEGISLAT
TORY OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT O
prepared for the Subcommittee of Labor of the Committe
Labor and Public Welfare, United States Senate. The
sion which follows cites pages in the 1969 History.

When Congress began considering the legislation
ultimately became the 1969 Act, the primary bill intr
in the House was H.R. 13950 and the primary bill intr
in the Senate was S. 2917. Section 215(b) of S. 2917
tained a provision that the mine map was to be made a
to certain persons, but no reference was made to surf
owners. History, pp. 75; 208; 856. Section 312(b) o
13950 contained the same provision as section 215(b)
that is, the bill required the map to be made availab
certain persons, but made no reference to surface lan
and the House bill also did not refer to the confiden
of the map. History, pp. 1003; 1317; 1337.

to making the map available to surface landowners. His-
, pp. 1402; 1427. The House, however, insisted that
917 be amended to conform with H.R. 13950 and requested
nference with the Senate. History, p. 1438.

Conference Report No. 91-761, 91st Cong., 1st Sess. to
mpany S. 2917 shows that the conferees had amended sec-
312(b) to add the confidentiality provision which is now
ained in that section and also added the provision that
ap was to be made available to "persons owning, leasing,
esiding on surface areas of such mines or areas adjacent
uch mines." History, p. 1486. The Conference Report ex-
ned the changes as follows:

> Both the Senate bill and the House amendment required the maintenance of a mine map. The Senate bill required that the map be confidential except for disclosure for certain specified persons. The House amendment directed that the Secretary of Housing and Urban Development receive a copy. The conference substitute provides that the map shall be made available to the Secretary and his inspectors, the Secretary of Housing and Urban Development, the miners and their representatives, operators of adjacent mines, and to persons owning, leasing, or residing on surface areas of such mines or on areas adjacent to such mines, but that otherwise it shall be kept confidential.

ory, p. 1529.

The section-by-section analysis of S. 2917 states with re-
to section 312(b) that:

> Subsection (b) requires that mine maps shall be available upon request, to the Secretary, State coal mine inspectors, the miners, operators of adjacent coal mines, persons owning, leasing or residing on surface areas and the Secretary of Housing and Urban Development.

ory, p. 1618.

It is obvious from the above discussion of the legisla-
history that when the conferees added "persons owning,
ng, or residing on surface areas of such mines or on
s adjacent to such mines" that they did not distinguish
rights of the surface residents from the rights of the
etary's inspectors to see mine maps. Section 312(b)

the map or make certain that any specific individual at the mine to show them the mine map.

While I sympathize with SOCCO's management that never have to show its mine map to any person who is ing in his or her insistence upon seeing the map, th remains that Satterfield was among those persons who entitled to see the map. Since section 312(b) does specify any conditions which a surface resident must order to see the mine map, the surface resident is same position as an inspector is when he asks to hav map made available for his inspection. Inspectors mines during all three working shifts to make their tions. They are just as likely to ask that the mine made available at 3 a.m. on the midnight to 8 a.m. they are to ask that the map be made available durin shift between 8 a.m. and 4 p.m. If a surface reside should wake up in the middle of the night and find house is sinking into a coal mine, there is every re believe that he might want to see the mine map at 3 he could find anyone at the mine at that time of nig

While SOCCO's land manager may tell an inspecto SOCCO is a business just like a courthouse and is en keep regular hours just like any other business (Fin 13 above), it is a fact that courts do not dig tunne people's homes and courts are not likely to cause th hension which people experience when they see bumps and see strangers examining the foundations of thei (Finding No. 2 above). A surface resident who is d the condition of the ground under and around his hom ly to go to see the mine map in a state of agitatio times, he may forget to be polite when he is told by company that he may see the mine map only when a si is conveniently present to show him the map.

The fact that at least one of SOCCO's employee June 5 that Satterfield ought to have been able to map, even though the land manager was not present t the map indicates that SOCCO's policy of allowing o land manager to show a surface resident the map was well-known rule (Finding No. 4 above). Additionall that another of SOCCO's employees fixed an evening of 7:30 p.m. when Satterfield could see the mine ma that SOCCO's policy of allowing only the land manag surface residents the map only during the hours of 4:30 p.m. was not well known (Finding No. 5 above).

that he was a surface resident and did not need to ask for any proof. Second, SOCCO did not decline to show Satterfield the map on the ground that he had not proven he was a surface resident who was entitled to see the map. The sole ground given by SOCCO for refusing to show Satterfield the map was that SOCCO's land manager was not at the mine to show him the map (Finding No. 4 above). Third, when the land manager finally did show Satterfield the map on June 20, 1984, he had already drawn squares on the map to designate the location of the houses in which Satterfield and his mother lived (Finding No. 10 above).

There is no merit to SOCCO's argument that it ought to be able to designate the land manager as the sole person to show the mine map to surface residents because he would be the most knowledgeable person to perform such duties (Cross motion, p. 11). SOCCO does not challenge Satterfield's statement that when the land manager finally did show him the map the land manager refused to answer any of Satterfield's questions about the map, such as the location of a church in which Satterfield was interested (Finding No. 10 above).

SOCCO's Alleged Efforts To Accommodate Satterfield

SOCCO emphasizes the length to which its land manager went in his efforts to make the mine map available for Satterfield's inspection (Cross motion, pp. 9-10). SOCCO claims that the land manager offered to come to the mine before 8 a.m. to show Satterfield the map and also offered to stay late to show Satterfield the map. Satterfield agrees that the land manager offered to come in early to show him the map, but Satterfield explained that he was working the day shift at Consolidation Coal Company's No. 20 Mine and that he had to leave for work at 6:30 a.m. and that he could not come to the mine to see the map before 8 a.m., Satterfield additionally testified that he works overtime about 8 days out of 10 and did not leave the mine until 6:00 p.m. Satterfield also worked on Saturdays and some Sundays. Satterfield said that if he did not work overtime, he could leave the mine at 4:30 p.m. and be at SOCCO's mine by 5:30 p.m. because it takes him an hour to drive home, but the land manager refused to stay an hour late to show him the map (Finding No. 6 above).

Despite the above testimony given by Satterfield under oath, SOCCO's cross motion (pp. 9-10) emphasizes that the land manager volunteered to stay late to show Satterfield the map. The only factual reference cited by SOCCO to support its claim that the land manager agreed to stay late to show Satterfield

deposition on September 20, 1984. I believe that t
validity and credibility in the statements of a dep
under oath than there is to a generalized statement
answer to an interrogatory. Therefore, I reject SO
that its land manager volunteered to stay late afte
show Satterfield the mine map.

Other aspects of the facts support my conclusi
land manager never agreed to stay late to show Satt
map. First, SOCCO's Answer No. 9b agrees that the
refused to stay late on June 5 to show Satterfield
spite the fact that another of SOCCO's employees ha
Satterfield that he could come to the mine about 7:
see the map on June 5. Second, it is uncontroverte
terfield did come to the mine about 7 p.m. on June
effort to see the map and returned to the mine at 7
June 20 at which time the land manager did show him
The fact that Satterfield came to the mine about 7:
two different occasions to see the map shows beyond
of doubt that Satterfield was willing to come to th
work to see the map. If the land manager had been
stay late to show Satterfield the map, the two men
had a meeting of minds on June 5 and no citation fo
of SOCCO to show Satterfield the map would ever hav
written. Finally, if the land manager had been as
ing as SOCCO's cross motion contends, Inspector Bow
not have had to say in his deposition that "I could
one to set a time -- one before 5:00 and one could
after 5:00 -- okay? I went ahead and cited the cit
try to get this over with." (Deposition, p. 63).

SOCCO's Claim that the Map was "Available"

SOCCO's cross motion (p. 12) refers to section
the Act and notes that the pertinent requirement of
tion is that the "[t]he coal mine map * * * shall b
for inspection by * * * persons * * * residing on s
areas of such mines". SOCCO then states that the d
for "available" in WEBSTER'S THIRD NEW INTERNATIONA
ARY (1976) is "accessible" or "obtainable". SOCCO
tends that it could not have violated section 312(b
it has a policy of having its land manager to show
map to persons residing on surface areas of its min
the hours of 8 a.m. and 4:30 p.m. SOCCO claims tha
map is available for inspection during that period
is "accessible" and "obtainable" by surface reside
argues further that since its land manager went out
to make the map available to Satterfield before and

Finding Nos. 4 through 10 above, SOCCO did not make the map available for inspection by Satterfield when he came to the mine to see it at 1 p.m. on June 5. SOCCO did not make the ma available for inspection at 7:30 p.m. on June 5 even though on of SOCCO's employees had told Satterfield it would be made available at that time. SOCCO did not make the map available for inspection when Satterfield again went to the mine to see it about 7 p.m. on June 19. Finally, SOCCO did make the map available for inspection about 7:30 p.m. on June 20 after SOCCO's management had been pressured by several MSHA inspectors and a supervisory inspector to make the map available. In the circumstances described above, one simply cannot find that SOCCO made its map available for inspection by Satterfield in conformance with the provisions of section 312(b) until after Citation No. 2420016 was written.

As I have pointed out above, SOCCO's policy of making the map available from 8 a.m. to 4:30 p.m. only if a single designated person is available to show the map is not a policy whic can be accepted as compliance with section 312(b). The land manager, like any other person, is likely to take an annual vacation, get sick occasionally, be given assignments away from his regular office at various times during the year, and may often be out of his office to each lunch. Consequently, SOCCO's policy of permitting a person to see its mine map only if the land manager is present between the hours of 8 a.m. and 4:30 p.m. is not an acceptable way to comply with section 312(b). Congress did not differentiate between the right of a surface resident to see the map and the right of an MSHA inspector to see the map. No MSHA inspector is likely to sit and wait patiently while the land manager gets around to finding it convenient to make the map available for his or her inspection. Similarly, a surface resident like Satterfield is entitled to see the mine map when he comes to the mine for that purpose and SOCCO cannot successfully claim that the map is "available for inspection" when a surface resident is denie the right to see the map simply because SOCCO's land manager happens to be out of the office at the time the surface resident comes to see the map.

SOCCO's Claim of Confidentiality

SOCCO's cross motion (p. 13) quotes the following pertinent provision from section 312(b) of the Act:

> Such map or revision and supplement thereof shall be kept confidential and its contents shall not be divulged to any other person, except to the extent necessary to carry the provisions of this Act.

its land manager is present, is a fully reasonable re
in light of its confidential nature. SOCCO then stat
Satterfield readily admitted that he had divulged the
of SOCCO's map to several individuals, some of whom w
even owners, lessors, or residents of the surface are
mine (Satterfield's Deposition, p. 37). SOCCO then c
that "Satterfield blatently violated the express term
regulation he so adamantly wishes to strictly constru
enforce" (Cross motion, p. 13, n. 13).

There are defects in SOCCO's reliance on the con
provision of section 312(b). The legislative history
cussed above shows that Congress specifically stated:

> that the map shall be made available to the Secr
> and his inspectors, the Secretary of Housing and
> ban Development, the miners and their representa
> operators of adjacent mines, and to persons owni
> leasing, or residing on surface areas of such mi
> or on areas adjacent to such mines, but that oth
> it shall be kept confidential. [Emphasis suppli

The incriminating statements from Satterfield's depos
(pp. 37-38) on which SOCCO relies for its contention
terfield "blatently violated the express terms" of se
312(b) are as follows: [The questions were asked by
counsel.]

> Q And who were these people, as best you can re
>
> A I think I told Ernie Carpenter. Let's see --
> Morrison. Let's see -- I believe -- I don't kno
> whether I -- I really don't recall who all had a
> me but at different times, you know -- since the
> was so much road damage, you know, they just wan
> to know, asked me if they were going to go under
> house.
>
> Q Are these your meighbors?
>
> A Oh, various people that --
>
> Q That live in that area?
>
> A Probably a couple of them live in that area.
> ably a couple -- just people who travel that roa

under my house.

Q Going under your house?

A Yes, where I live.

Q Did anyone want to know if they were going under their own houses, if Southern Ohio Coal Company was going under their own house?

A No. One conversation with a neighbor, he said he thought his house was going to be in the next panel.

Q Had he seen the mine map?

A A Martinka official had contacted him.

Since Congress made it very clear in the legislative history that the confidential provisions of section 312(b) did not apply to surface residents of SOCCO's mine or to surface residents of "areas adjacent to such mines", it does not appear that Satterfield was required to refrain from discussing the small amount that he learned from seeing SOCCO's map with the persons with whom he discussed the contents of the map.

As I have indicated above, the land manager refused to answer any of Satterfield's questions about the map except to point out on the map the location of the houses in which Satterfield and his mother lived. The land manager's uncooperative attitude in discussing the map with Satterfield left Satterfield with scarcely any information obtained from the map for discussion with other persons who had not seen the map Moreover, it does not appear that Satterfield discussed the map with anyone who might not have had a right to see the map if he had taken the time to go to SOCCO's mine for the purpose of asking that the map be made "available for inspection." All of the persons who asked Satterfield whether SOCCO was mining under his house at least traveled the road under which SOCCO had mined or was about to mine. The deposition fails to show whether those persons also resided on "areas adjacent to" SOCCO's Martinka Mine, but that probably accounts for their interest in the matter. In any event, SOCCO did not establish for certain that Satterfield discussed the mine map with persons who were not entitled to know about it under the express provisions of section 312(b).

which SOCCO allegedly committed on June 5 in refusing Satterfield the map when he came to the mine office a on that date (Finding No. 12 above). SOCCO argues th citation is invalid because it is based on what the i was told rather than on what he personally observed.

There is no merit to SOCCO's contention that an may issue a citation only on the basis of something w has personally observed. Section 104(b) of the 1969 provide that an inspector should issue a notice of vi if, "upon any inspection", he "finds" that a violatio occurred. When Congress amended the 1969 Act to prom the present Act, it considerably broadened the inspec authority to issue citations by providing that he cou "upon inspection or investigation" if he "believes" t violation has occurred. Congress explained its reaso enlarging the inspector's authority as follows:

> Section [104(a)] provides that if, upon inspecti or investigation, the Secretary or his represent tive believes an operator has violated this Act or any standard, rule, order or regulation promu gated pursuant to this Act, he shall with reason able promptness issue a citation to the operator There may be occasions where a citation will be delayed because of the complexity of issues rais by the violations, because of a protracted acci- dent investigation, or for other legitimate rea- sons. For this reason, section [104(a)] provide that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action. Citations shall de- scribe with particularity the nature of the vio- lation, and fix a reasonable time for the viola- tion's abatement.

LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HE OF 1977, July 1978, 618.

MSHA frequently is required to base its citation lations on information obtained from interviewing eye to violations rather than on information gained by an tor's own observations of violations. Many citations after investigations of accidents are based on inform obtained by inspectors who interview witnesses after dents occur. In cases involving explosions, it is so too hazardous for inspectors to make personal examina actual sites of the explosions and they ultimately is tions based on interviews of persons who obser d th

upheld the validity of a citation which did not cite Old Dominion for the violation there involved until 12 months after the violation had occurred. There was a reasonable basis for the delay in issuing the citation in the Old Dominic case just as there is in this case.

In this proceeding, Satterfield reported to MSHA on June 5 that SOCCO had refused to show him the mine map that day when he went to the mine at 1 p.m. to see the map. MSHA confirmed Satterfield's belief that SOCCO was required to show him the mine map because of his status as a surface resident, but Satterfield, at that time, declined MSHA's offer of assistance in getting to see the map and stated that he would make another attempt to see the map through his own efforts (Finding No. 5 above). The fact that Satterfield initially declined to ask MSHA to intercede actively on his behalf shows that he was at first inclined to be quite reasonable in giving SOCCO another chance to make the map available for inspection. If SOCCO's land manager had shown any flexibility in his willingness to stay late to show Satterfield the map, no citation would ever have had to be issued.

When the land manager again refused to show Satterfield the mine map on June 19 after Satterfield had gone to the mine under a mistaken impression that SOCCO had agreed to make the map available, Satterfield asked Inspector Bowers, who happened to be at the mine at that time, to issue a citation. The inspector declined to issue a citation at first because he had not investigated the facts. Subsequently, when he received a call from his supervisor requesting him to check into SOCCO's refusal to show Satterfield the map, he talked to another inspector who had already investigated the matter and Bowers thereafter personally experienced considerable difficulty in obtaining an agreement by SOCCO's management to show the map to Satterfield after 5 p.m.

Section 104(a) not only provides for an inspector to issue a citation on the basis of an investigation if he believes that a violation has occurred, but also provides that "the citation shall fix a reasonable time for the abatement of the violation." The inspector explained in his deposition that he did not issue the citation until SOCCO had agreed upon a time for showing Satterfield the map, that is, had agreed upon a time for abatement of the violation. The inspector then stated that he issued the citation "to try to get this over with" (Deposition, p. 63).

Using the inspector's statement that he issued the citation "to get this over with," SOCCO argues in its cross motio

tion until SOCCO had finally agreed upon a time for
(Deposition, pp. 63; 65). The discussion above sho
tion No. 2420016 was properly issued under section
cause it was based on an investigation of the facts
SOCCO's refusal to show Satterfield the map on June
issued after Inspector Bowers had finally obtained
abatement for insertion in the citation as required
104(a) of the Act.

SOCCO's cross motion (p. 15) cites two cases i
of its final argument that Citation No. 2420016 mus
because no violation of section 312(b) existed at t
citation was issued. The first case on which SOCCO
one decided by Chief Administrative Law Judge Merli
Steel Corp., 5 FMSHRC 1158 (1983), in which Chief J
held that no violation of 30 C.F.R. § 75.604 existe
stances, based on credibility determinations, showi
defective permanent splice described in the citatio
removed from a trailing cable before it was cited b
spector as being defective. In the Republic case,
Merlin specifically stated that his ruling did not
violation which remained in existence at the time t
was cited. 5 FMSHRC at 1162. The other case relie
SOCCO is Consolidation Coal Co., 5 FMSHRC 1463 (198
involved an order by Chief Judge Merlin requiring M
plain why Consol was being allowed to pay a $20 per
case in which MSHA had asked to withdraw its petiti
assessment of civil penalty. Chief Judge Merlin's
stated that it was "inconsistent for the Solicitor
withdraw his penalty petition and at the same time
operator to pay a $20 penalty". 5 FMSHRC at 1463.

Obviously, the two cases cited by SOCCO do not
claim that the citation in this case should be vaca
no violation existed on June 19, 1984, when the cit
issued. SOCCO refused to make its mine map "availa
spection" by Satterfield on June 5 2/ and SOCCO cor

2/ As the Secretary's reply brief (p. 3) notes, "I
original copy of the map located in a vault (on mi
there are at least 11 "500 scale" reproductions loc
out various mine offices and rooms". SOCCO's Answe
3(c)(ii) to the Secretary's interrogatories. When
finally saw the map, he was shown a "500 scale" rep
SOCCO's Answer No. 9b.

through 10 above). Consequently, SOCCO's contention that no violation of section 312(b) or of section 75.1203 occurred must be rejected as being contrary to the facts and unsupported by the cases cited in SOCCO's cross motion.

WHEREFORE, it is ordered:

(A) The motion for summary decision filed on December 7, 1984, by the Secretary of Labor is granted and the cross motion for summary decision filed on December 24, 1984, by Southern Ohio Coal Company is denied.

(B) The notice of contest filed on June 25, 1984, by Southern Ohio Coal Company, as supplemented on August 30, 1984, is dismissed and Citation No. 2420016 issued June 19, 1984, alleging a violation of section 75.1203, is affirmed.

(C) The issues raised in this proceeding in Docket No. WEVA 84-296-R are severed for purpose of separate disposition from the issues raised in Docket No. WEVA 84-281-R with which the issues raised in Docket No. WEVA 84-296-R were previously consolidated in a prehearing order issued on August 23, 1984.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

David A. Laing, Esq., and Alvin J. McKenna, Esq., Alexander, Ebinger, Fisher, McAlister & Lawrence, 1 Riverside Plaza, 25th Floor, Columbus, OH 43215-2388 (Certified Mail)

Heidi Weintraub, Esq., Robert A. Cohen, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

ETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
E SAFETY AND HEALTH	:	
INISTRATION (MSHA),	:	Docket No. SE 84-68-M
Petitioner	:	A.C. No. 40-00041-05502
	:	
v.	:	Marmor Quarry & Mill
	:	
J. CRAIG COMPANY,	:	
Respondent	:	

DECISION

rances: Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Mr. John J. Craig, President, John J. Craig Company, Knoxville, Tennessee, for Respondent.

re: Judge Lasher

This matter came on for hearing in Knoxville, Tennessee, on ry 9, 1985. MSHA seeks assessment of a $91 penalty each for iolations of 30 C.F.R. § 56.14-1 [1]/ alleged in Citation Nos. 846 and 2080847, issued by MSHA Inspector Dallas Shipe on l 18, 1984 during a regular inspection.

At the end of the hearing, [2]/ Respondent's president, John raig, conceded the occurrence of the violation described in

30 C.F.R. § 56.14-1, pertaining to guards, provides as ows:

> 56.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

Tr. 133-135, 139.

PRELIMINARY FINDINGS

Based on stipulations reached by the parties, and the testimony and documentary evidence of record, it is found:

(1) Respondent, a small family corporation historically engaged as a producer of and wholesale dealer in Tennessee Ma and Terrazzo chips, operated the Marmor Quarry and Mill at al times pertinent to these proceedings (Tr. 64) and is subject the jurisdiction of the Federal Mine Safety and Health Act.

(2) Respondent is a medium-sized mine operator in the marble industry (Tr. 124).

(3) Assessment of reasonable penalties will not jeopard Respondent's ability to continue in business (Tr. 66).

(4) Respondent proceeded in good faith to attempt to achieve abatement of both violations after notification there (Tr. 58). No finding is made, however, that both violations remained abated.

3/ The condition cited in Citation No. 2080847 is as follows

> The flywheel and the wide drive belt on the No. 5 gan saw was not guarded to keep a person from falling int them. A walkway is heavily traveled by the employees

4/ The violative condition cited is described therein as foll

> "The pinion shaft for the derrick hoist in the Engine Room No. 3 was not guarded. The shaft extends out ab 4 inches with a key in it. The end of the shaft was about one-foot from the derrick operator's leg. His clothing could be caught in it."

5/ The amount of a penalty should relate to the degree of a m operator's culpability in terms of willfulness or negligence, seriousness of a violation, the business size of the operator and the number of violations previously discovered at the min involved. Mitigating factors include the operators good fait abating violative conditions and the fact that a substantiall adverse effect on the operator's ability to continue in busin would result by assessment of penalties at some particular monetary level. Factors other than the six criteria expressl provided in the Act are not precluded from consideration eith

Inspector Shipe credibly testified that, having i
fatality in North Carolina caused by an unguarded rota
(Ex. P-5), he observed the condition described in the
and determined it to be a violation even though in sev
previous inspections conducted over the prior 4 years
had seen the same condition at Respondent's mine but h
recognized it as a violation. 6/

When operating the machinery (drum) the derrick h
operator sits facing it on an elevated bench with the
large (3-4 inches in diameter) pinion shaft exposed ap
4 inches-rotating directly in front of him at approxim
height, pointed not toward him but at right angle to h
and about 1-foot from his legs (Tr. 15, 16, 50, 51; Ex
The condition, as such, was readily visible. The rota
has a gear on it which pulls the drum and a "key" - wh
out on the shaft to help hold the gear to the shaft -
anything that got wrapped around it" according to the
(Tr. 17, 59). The derrick hoist with the unguarded pi
had apparently been operated in the same manner by the
operator, Ray Davis, for a period of many years (Tr. 7

The hazard envisioned by the Inspector was (1) th
machine operator's clothing could become entangled in
pulling him into the machinery and suffocating him in

6/ Sketches of the small shed-like building (engine r
the derrick hoist was located, were prepared at the he
both the Inspector (Ex. P-6) and Mr. Craig (Ex. R-1).
of the hearing, a view of the area was taken by the un
which was unreported since the Court Reporter had no p
equipment available to record the same. The view indi
neither sketch is entirely accurate. In particular, n
sketch correctly depicts the relative positions of the
through the area relative to the elevated bench upon w
operator sits and the shaft. The direction which the
shaft faced relative to the operator's bench is correc
in Ex. R-1. However, R-1 incorrectly shows the walkwa
the bench, rather than its actual location between the
the bench.

had the operator, Mr. Davis, or the foreman in his absenc
actually been caught by the rotating shaft, the shut-off switc
for the hoist would not have been within reach (Tr. 25, 45).
addition to the machinery operator, other miners, who Responde
admits would from time to time, come into the building for
various purposes, were placed in jeopardy by the violative
condition.

Although the parties differed on the probabilities of the
hazard posed by the violation ever coming to fruition, the
opinion of the Inspector that it was reasonably likely to happ
and that such could happen anytime is credited, particularly i
view of the close proximity of the operator to the exposed sha
in the ordinary course of his operation of the derrick hoist.
Craig's opinion to the contrary, based at least in part on the
belief that no such accidents had happened previously, is not
well founded. Must a serious injury or fatality actually occu
before a hazard is cognizable? As noted above, had the clothi
of the operator or other person been caught in the rotating
pinion shaft the shut-off switch would not have been within re
Thus, the elements for a serious, if not fatal, accident are
present: (1) an unguarded rotating shaft, (2) in close proximi
to the operator as well as the walkway which occasionally is
traveled by other miners. The possibility of the accident
occurring as contemplated by the Inspector clearly was not rem
There was at least a reasonable possibility of a miner's
contacting the rotating shaft and suffering a resultant injury
Secretary v. Thompson Brothers Coal Company, Inc., 6 FMSHRC 20
(September, 1984). Such an accident could have occurred becau
of the inadvertence or pre-occupation of a miner while perform
his routine or assigned tasks in an otherwise reasonable or
prudent manner. Aberrational conduct or reckless disregard of
miner for his safety would not have been required for such an
accident to occur.

Respondent contends that the degree of its negligence wit
respect to this violation should be significantly reduced beca
MSHA for a period of several years prior to April 18, 1984, ha
not found the condition to be an infraction. While the
Secretary's lack of enforcement does not estop later enforcemc
if the safety standard is applicable, Secretary v. Burgess Mi
and Construction Corporation, 3 FMSHRC 296 (February, 1981),

a factor which should be considered in mitigation of
to be assessed, Secretary v. King Knob Coal Company,
FMSHRC 1417 (June, 1981), stating:

> "The Supreme Court has held that equitable
> generally does not apply against the federal
> Federal Crop Insurance Corp. v. Merrill, 332
> 383-386 (1947); Utah Power & Light Co. v. Uni
> 243 U.S. 389, 408-411 (1917). The Court has
> pressly overruled these opinions, although in
> years lower federal courts have undermined th
> Utah Power doctrine by permitting estoppel ag
> government in some circumstances. See, for e
> United States v. Lazy F.C. Ranch, 481 F.2d 98
> (9th Cir. 1973); United States v. Georgia-Pac
> 421 F.2d 92, 95-103 (9th Cir. 1970). Absent
> Court's expressed approval of that decisional
> think that fidelity to precedent requires us
> conservatively with this area of the law. Th
> strained approach is buttressed by the consid
> that approving an estoppel defense would be i
> with the liability without fault structure of
> Mine Act. See El Paso Rock Quarries, Inc., 3
> 35, 38-39 (1981). Such a defense is really a
> although a violation occurred, the operator w
> blame for it."

It is concluded from the circumstances presented
the pattern of MSHA's non-enforcement does greatly mi
Respondent's culpability. One would reasonably infer
record as a whole that the hazard to miners' safety w
not recognized by MSHA or the operator over a great p
time. Accordingly, the degree of Respondent's negli
found to be only minimal. On the other hand, in view
distinct possibility for serious or grievous harm to
this violation, it is found to be very serious.

Citation No. 2080847

Upon walking into Respondent's saw room on April
Inspector Shipe observed 2 gang saws (Nos. 5 and 6) r
unguarded. These two saws which had not been in oper
long time", had been placed into operation approximat
before the inspection. Respondent admitted the viola
pertained only to saw #5 (Tr. 112), and also conceded
aware that guarding (railing) was required on the 2 s

The flywheel, a huge wheel with spokes, is approximately 5 feet in diameter and constructed of heavy metal. It runs fairly rapidly and could catch a miner or other person walking, nearby. The hazard envisioned by the Inspector was that a person could slip, fall or stumble into it or inadvertently walk into it. He indicated that occasionally there was "heavy traffic" along the walkway which is immediately adjacent to the revolving flywheel (Tr. 108, 109). Both miners and visitors to the office, which is adjacent to the gang saws, were placed in jeopardy of serious, if not fatal, injuries by the hazard created by the violation. There was at least a reasonable possibility of contact and injury. Secretary v. Thompson Brothers Coal Company, Inc., supra. This is found to be a serious violation resulting from a high degree of negligence on the part of Respondent.

The evidence bearing on all six mandatory penalty assessment criteria having been considered with respect to the 2 violations, it is concluded that the penalties proposed by the Secretary in this matter are appropriate and amply supported in the record with respect to both Citations.

ORDER

Respondent is ordered to pay the Secretary of Labor penalties totaling $182.00 ($91.00 for each violation) within 30 days from the date of issuance of this decision.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, Tennessee 37203 (Certified Mail)

Mr. John J. Craig, John J. Craig Company, P.O. Box 9300, Knoxville, Tennessee 37920 (Certified Mail)

/blc

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 83-68 A.C. No. 42-00094-03504
v.	:	Sunnyside No. 2 Mine
KAISER STEEL CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: James H. Barkley, Esq., Office of the Solicit
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Jeffrey Collins, Esq., Kaiser Steel Corporati
Colorado Springs, Colorado,
for Respondent.

Before: Judge Lasher

Prior to commencement of formal hearing on March 1, 1
the parties proposed voluntary settlement of this matter w
involved a fatality. Respondent agreed to pay a penalty o
$2,000.00. The Secretary's motion to amend the Citation
(No. 2073181) to allege a violation of 30 C.F.R. 77.404(b)
404(c) as originally cited, 1/ was granted at the same tir
There were no eyewitnesses to the fatal accident which res
when a "utility belt person" who was working alone was cau
between a return idle roller and a belt while performing m
nance or repairs. 2/ The Respondent, a large coal mine op
with a moderate history of previous violations during the

1/ Thus changing the nature of the infraction from perfo
maintenance or repairs with the power on and the machinery
unblocked to operation of machinery by persons not trained
authorized to operate such.

2/ MSHA's original penalty assessment was $206.00.

Committee. While the violation was found to be serious sin resulted in a fatality only a low degree of negligence on t part of the Respondent was demonstrated. 4/ Abatement of t violation was, upon notification, accomplished promptly and good faith by Respondent. 5/ Upon consideration of the representations of the parties, and it otherwise appearing reasonable and proper, the proposed settlement was approved the bench and is hereby affirmed.

Accordingly, if it has not previously done so, Respond shall pay the Secretary of Labor the sum of $2,000.00 withi days from the date hereof.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Depar of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Jeffrey Collins, Esq., Kaiser Steel Corporation, 105 E. Kio Suite 200, Colorado Springs, Colorado 80901 (Certified Mai

3/ Precise information with respect to the six mandatory p assessment factors was submitted on the record by stipulati agreement of the parties.

4/ Although the decedent had received some prior training, inferred from Respondent's admission of the occurrence of t violation that he was insufficiently trained.

5/ Significantly, abatement was accomplished by retraining employees in belt cleaning and safety procedures, thus supp the Secretary's on-the-record amendment of the violation to involving training.

/blc

BOBBY W. CAMPBELL, Complainant	:	DISCRIMINATION
	:	Docket No. WES
v.	:	
	:	MSHA Case No.
DANIELS CONSTRUCTION COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Carlson

The parties, through counsel, have filed a sti which settles all matters at issue in this discrimi proceeding.

At the center of the settlement is an agreemen respondent to pay a sum of money to complainant in which complainant agrees not to seek employment wit or its subsidiaries or divisions, and in which comp agrees to withdraw his complaint and to release res any and all claims.

The parties further stipulate that respondent violation of the Federal Mine Safety Act or any oth or federal, in terminating complainant's employment

I conclude that the proposed settlement should in all respects. Respondent shall therefore pay to with dispatch, the monies agreed upon, whereupon al provisions of the settlement shall be deemed in eff proceeding shall be dismissed with prejudice.

SO ORDERED.

John A. Carlson
Administrative Law

Distribution:

James W. Nobles, Jr., Esq., Post Office Box 1733, J Mississippi 39215 (Certified Mail)

Carl B. Carruth, Esq., Thompson, Mann and Hutson, 2 Building, Greenville, South Carolina 29602 (Certif

PLATEAU MINING COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 84-106-R
v.	:	Citation No. 2213805; 1/5/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Star Point No. 2 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 84-122
	:	A.C. No. 42-00171-03523
v.	:	Star Point No. 2 Mine
PLATEAU MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: John A. Snow, Esq., VanCott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Contestant/Respondent; James H. Barkley, Esq., and Margaret Miller, Esq., Office of the Solicitor, U.S. Oepartment of Labor, Denver, Colorado, for Respondent/Petitioner.

Before: Judge Lasher

Prior to commencement of formal hearing on March 4, 1985, the parties submitted a proposed settlement of this contest/penalty proceeding. The parties agreed to a penalty assessment of $9,000.00 for the violation of 30 C.F.R. § 75.1722(c) cited in Citation No. 2213805 1/ which involved a fatality.

1/ The citation was modified by Petitioner and approved on the record to reflect its issuance under section 104(a) of the Act rather than 104(d)(1).

the violation upon notification thereof. With respe
gravity, it was determined on the record that the vi
resulted in the fatal injury to the operator of a sh
described in the citation. A low degree of negligen
part of the Respondent was also stipulated and deter
record.

Upon due consideration of the premises, the set
approved from the bench and is here affirmed.

Respondent, if it has not previously done so, s
Secretary of Labor the sum of $9,000.00 on or before
the date hereof. 3/

Michael A. Lasher, Jr.
Administrative Law Judg

Distribution:

John A. Snow, Esq., VanCott, Bagley, Cornwall & McCa
Main Street, Suite 1600, Salt Lake City, Utah 84144
Mail)

James H. Barkley, Esq., and Margaret A. Miller, Esq.
the Solicitor, U.S. Department of Labor, 1585 Federa
1961 Stout Street, Denver, Colorado 80294 (Certifie

2/ The parties emphasized that their stipulations w
solely for purposes of resolving this proceeding und
Federal Mine Safety and Health Act of 1977 and were
confined thereto.

3/ Consistent with the penalty settlement, the cont
No. WEST 84-106-R is denied.

/blc

APR 19 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 85-4 A. C. No. 12-00337-03521
v.	:	Lynnville Strip Mine
PEABODY COAL COMPANY, Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for Petitioner;
Michael O. McKown, Esq., St. Louis, Missouri, for Respondent.

Before: Judge Steffey

Pursuant to a notice of hearing dated January 14, 1985, a hearing in the above-entitled proceeding was held on February 14 and 15, 1985, in Evansville, Indiana, under section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977.

After the parties had completed their presentations of evidence and had made their respective closing arguments, I rendered a bench decision, the substance of which is set forth below (Tr. 414-443):

In a civil penalty case, the issues are whether violations occurred and, if so, what penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act.

Although counsel for the Secretary of Labor seemed to be asking me in his closing argument to make a ruling on whether the order was valid or not, in a civil penalty case, the validity of the order is not considered to be an issue. The Commission so held in Wolf Creek Collieries Company, a decision which is not included in the Commission's reports, but which was issued on March 26, 1979, in Docket No. PIKE 78-70-P. In that case, the Commission cited the decisions of the former Board of Mine Operations Appeals in Plateau Mining Co., 2 IBMA 303 (1973), Buffalo Mining Co., 2 IBMA 327 (1973), a[illegible]o th Ameri[illegible]oa Corp., 3 IBMA 93, 120

For the above reason, I shall make findings a violations occurred, and if I find a violation, I a civil penalty, but I shall not rule on whether t a technically valid order issued under section 104 Act.

The parties entered into some joint stipulati think should be a part of the decision. Those are

1. Peabody Coal Company owns and operates th Strip Mine in Lynnville, Warrick County, Indiana.

2. The Lynnville Strip Mine is subject to th Mine Safety and Health Act of 1977.

3. The Federal Mine Safety and Health Review has jurisdiction over this proceeding.

4. On April 4, 1984, Dennis Springston, a mi at the Lynnville Mine, was killed during an accide mine.

5. On April 5, 1984, Inspector Joseph L. Her authorized representative of the Secretary of Labo Citation No. 2322072 and Order of Withdrawal No. 2 reference to the above-mentioned accident.

6. During the calendar year prior to the iss the citations involved in this case, the Lynnville had a production of approximately 3,287,102 tons o

7. During the calendar year prior to the iss the citations involved in this case, the controlli had a production of approximately 51,660,483 tons

8. Payment of the penalties assessed by the and Health Administration for the citation and ord drawal involved in this case would not affect the Peabody Coal Company to remain in business.

The evidence in this proceeding supports the findings of fact, which I shall set forth in enume graphs:

1. Citation No. 2322072, which is Exhibit 1 ceeding, was issued on April 5, 1984, under sectio of the Act, citing a violation of 30 C.F.R. § 77.1 The citation alleged that men were working in an a

truck was fatally injured. The collapse of the highwall covered up a pickup truck and also damaged the 170(L) loader, and another pickup truck. Citation No. 2322072 was terminated on April 6, 1984, pursuant to a subsequent action sheet issued that day, as modified by another subsequent action sheet dated December 3, 1984.

2. Section 77.1006(a), which was alleged to have been violated in Citation No. 2322072, reads as follows: "Men, other than those necessary to correct unsafe conditions, shall not work near or under dangerous highwalls or banks."

3. Order No. 2322073, which is Exhibit 3 in this proceeding, was issued on April 5, 1984, under section 104(d)(1) of the Act, citing a violation of section 77.1001, and alleging that "[l]oose, hazardous and overhanging material on the highwall of the 1150 No. 2 Pit was observed on the entire length of the approximately 2,800 foot highwall. This condition was observed during an investigation of a fatal accident."

4. Section 77.1001, which was alleged to have been violated in Order No. 2322073, reads as follows: "[l]oose, hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection."

5. A modification of Order No. 2322073 was issued on April 10, 1984. That modification stated that it was issued to reflect the following change (Exhibit 3, p. 3):

> Loose hazardous and overhanging material on the highwall of the 1150 No. 2 Pit begins at the north end of the pit and extends approximately 1,090 feet southeast on the highwall, for a total length of 1,090 feet. Area No. 2 begins at a point 110 feet south of the center of the entrance road, at the pit floor, then extends south approximately 380 feet, for a total length of 380 feet.

6. A subsequent action sheet was written on April 16, 1984, and that sheet terminated the order with the statement that "[t]he north end of the pit, approximately 1,090 feet, was posted, and workmen were removed from the area. Area No. 2, 380 feet south of the center of the entrance road at the pit floor, berms were installed approximately 8 feet in height and approximately 30 feet from the highwall" (Exhibit 3, p. 4)

unconsolidated or loose material. He observed sta
wall which were gapped open from 4 to 6 inches. He
served 14 charged holes in which explosives had no
nated. Two such bags of explosives are shown in th
graph, which is Exhibit 11 in this proceeding. He
that the violations of sections 77.1006(a) and 77.
associated with a high degree of negligence becaus
had failed to keep miners away from the highwall,
agement knew was unsafe because of the large numbe
tries in the onshift books showing the pit foremen
about the bad conditions observed in the highwall
13). He also expressed the belief that the violat
very serious because a fatal accident had occurred
sult of them. He believed that management should
structed a berm at the base of the highwall to cat
material when there was an indication of loose mat
the highwall, as indicated in the onshift book, an
that the berms would have kept both miners and equ
from the dangerous highwall.

8. Inspector Ritchie investigated the accide
viewing miners and foremen who were working when t
occurred. The interviews of Peabody's miners, for
mine officials have been transcribed and are a par
B in this proceeding. Inspector Ritchie also prep
port of the accident, which is Exhibit 4. Based o
amination of the accident site, he concluded that
tions of sections 77.1006(a) and 77.1001 had occur
inspector agreed, on cross-examination, however, t
not be certain that Peabody could have determined
was imminent, based on an examination of the highw
to the occurrence of the accident.

9. Charles Hester is a pit foreman who made
entries in the onshift book, Exhibit 13, and he re
the highwall as being "ragged" on many pages of th
book, but he insisted that his use of that term me
cated that the wall was uneven and did not mean th
thought the wall was unsafe for work to be perform
proximity to the wall.

10. Cecil O'Dell is an MSHA field office man
assigns work to inspectors and evaluates their wor
lieved that use of the word "ragged" meant that th
was very unreliable and that the use of terms like
areas", shown in the onshift book, indicated that
foremen were expressing existence of unsafe condit
thought that the onshift reports showed that the f

barricading or constructing berms at the foot of the highwall.

11. Gaylon Leslie is a shooter and has been for 10-1/2 years. He is also chairman of the safety committee, and he said there was overhanging material on the day of the accident, because he saw it. He had received complaints from miners regarding the 1150 No. 2 Pit. He examined the basis for their complaints and agreed with their belief that the highwall was hazardous, especially because of the practice of blast casting, which is a method of using explosives to throw overburden into the pit rather than just to shake it loose by lifting overburden straight up, as is done in conventional shooting. Leslie was with Inspector Bryant, who made a spot inspection of the 1150 No. 2 Pit on the day before the fatal accident. He said that Inspector Bryant did not cite any violations as to the highwall, but Bryant was close to the No. 4 Panel, shown on the mine map (Exhibit A), rather than the northern end of the pit, where the accident occurred. Bryant also testified that he saw no conditions requiring issuance of a citation on the day before the accident even though he did inspect the very same area where a berm had to be constructed in order to abate Order No. 2322073.

12. Leonard Hughes was superintendent at the time of the fall of the highwall. He has 38 years of experience, 13 of them being at Lynnville. He stated that highwall conditions vary and can go from a safe condition to an unsafe condition as the result of rain, wind, freezing, and thawing. He had not seen a fall of the magnitude of the one which occurred on April 4, which was about 170 feet long and 15 feet thick. The term "ragged", used in the onshift book, to him, means "uneven", but not necessarily hazardous. He said that they were having problems with the highwall and with the spoil bank, so they went to blast casting as an alternative which they hoped would improve both production and safety. Nevertheless, in his interview by MSHA investigators, as shown in Exhibit B, he recognized that a sloping highwall would have prevented the magnitude of the fall which occurred on April 4.

13. Tom Hughes is a blasting foreman. He examines the top of the highwall which has about 4 to 5 feet of dirt on top. He drills from sites on top of the highwall as well as from locations down in the parting in the pit, and has to evaluate the condition of the highwall from both the top and the pit. His entries in an onshift book, which is restricted to the drill area, and which is Exhibit 14 in this proceeding, show that on at least one occasion, he instructed his crew to leave 25 to 30 feet of parting in the pit in order to stay away from the highwall (Exhibit 14, p. 21). He also explained

was less breaking of the rock at the rear of the highwal would have occurred if all the charges had exploded as w intended.

14. Charles Bellamy is a safety supervisor of the mine, and he believed, from his interviews of personnel ent at the time of the accident, that foremen and miners not have anticipated the fall based on an examination of wall. He was with Inspector Hensley on April 5, when th tation and order here involved were written, and he does think that the inspector properly described the area of loose rock. He stated that they constructed the berm to the order terminated, but that he did not believe the wa loose materials on it.

15. Bob Hart is Peabody's Indiana drilling and bla manager. He testified that they went to the blast casti method because they had reached a point that it was unec to mine coal if they had to move more than 15 cubic yard overburden to obtain one ton of coal. Doubling the amou explosive moves more overburden with blasting and increa yardage obtained by use of the dragline. He agreed that the accident, Peabody went to using angle drilling so th blast casting could continue to be used to achieve econo while leaving an increased slope on the highwall to impr safety of the highwall's condition.

16. Conny Postupack is an official with Atlas Powd Company, and he explained that blast casting was begun i 1935, and then became somewhat unfashionable because exp sives lost their economic advantage to the increased ecc mies of scale accompanying the use of draglines, until t increasing labor and material costs associated with mech cal overburden removal were overcome by economies in the facturing of explosives. Consequently, blast casting is in vogue and is being used in Pennsylvania, West Virgini Ohio, Kentucky, Wyoming, New Mexico, and Alaska. He emp sized that unconsolidated materials are not subject to b casting, as there must be good integrity of the formatic being shot.

17. Curtis Ault is a supervising geologist who wor for the Indiana Geological Survey. He has been working the last 7 years in studying faults and joints in Indian A fault is a crack with slippage between the materials r

lief, based on testimony of witnesses Hart and Leslie, and pictures made by MSHA, especially Exhibits 7, 8, 11, and 12, that the fall of the highwall in the 1150 No. 2 Pit was caused by joints. He cannot be certain of that belief because he did not personally examine the Lynnville Mine here involved. Moreover, his testimony shows that the joints he observed in the pictures were not parallel to the slice of rock which fell, and that would mean that Peabody was constructing the highwall in the direction which would have been recommended in order to prevent a fall as a result of the presence of joints in the overburden which had been blasted.

I believe that those findings cover the important aspects of the evidence which was introduced in this proceeding.

The Secretary's attorney asked me to find that the violations, alleged in Citation No. 2322072 and Order No. 2322073, occurred.

Counsel for Peabody argues that his evidence shows that the violations did not occur, and he also pointed out that when there is a fatality and MSHA conducts an investigation, there is a considerable amount of pressure on the inspectors to find something wrong, and he feels that that gives them a motivation to be more critical after such an accident than they would be otherwise.

I agree with Peabody's counsel that such pressure undoubtedly exists and that is one of the reasons that I asked a great many questions during the hearing which were intended to bring out all the good aspects that Peabody was trying to present, because it always worries me in a case of this nature that MSHA may unfairly cite violations because of the pressure of finding a problem when a fatality has occurred. I have reviewed the evidence in great detail and I believe that there is probably a middle ground between what MSHA has presented and what Peabody has introduced, and that is often the case in these proceedings.

I was at first disposed to find no violations, but Mr. McKown introduced the transcript from MSHA's investigation, and I read that in great detail last night. That is Exhibit B in this proceeding and that exhibit is made up of testimony of the miners and foremen who were present when the fatality occurred. That exhibit contains some statements by the witnesses which motivated me to believe that there was considerable support for the inspectors' belief that violations had occurred.

one takes that testimony, by itself, then he would conclude that there is no way that Peabody could have been aware that men were working near a highwall which was hazardous.

The Commission has held that an operator is liable without regard to fault for the occurrence of a violation. United States Steel Corp., 1 FMSHRC 1306, 1307 (1979). Consequently, Peabody may be held liable for the violation despite the fact that the record contains evidence tending to show that Peabody may not have been at fault for occurrence of the violation. In addition to the statements, referred to above, of witnesses who said that they could not have determined from looking at the wall, prior to its fall, that a massive rock fall was about to occur, there is testimony by the superintendent, Leonard Hughes, and by the explosives expert, Bob Hart, to the effect that the company went to the blast casting method in order to achieve economies, and it did so based on the fact that blast casting had been done at other Peabody mines without any apparent problems. The evidence discussed above makes it difficult to say that management was necessarily at fault for using blast casting at the 1150 No. 2 Pit, particularly since mine officials had tried that method at the 5900 Pit and had had no problems, but that was a different kind of operation, with a shovel instead of a dragline.

On the other hand, there is considerable evidence to support a conclusion that Peabody ought to be held at fault for the violation of section 77.1006(a). For example, when MSHA was conducting its investigation, the coal loader operator, Raymond Speicher, said that he did not like vertical walls; that they have given a lot of trouble. He specifically stated that after they started using blast casting, there was "ragged looking highwall, rocks breaking out every now and then. I always like a sloped bank myself" (Exhibit B, p. 41). Speicher also was of the opinion that rain had gone into a crack behind the large hunk of wall that fell out and had weakened it, and that that accounted for the fact that it fell.

Mike Denton, the oiler on the coal-loading machine, also stated that he prefers the slope, and it seems that the slope is a safer wall (Exhibit B, p. 42).

Ron Sutton, the tractor operator, stated that he does not like the vertical highwall at all. He said they had a slide just after that highwall was opened up, and they had to go back and reclean it. He also pointed out about the bags of powder that he found unexploded. He stated that he was afraid to haul the explosives on his tractor nd that e put

sitting next to that wall, because the whole wall will come down. He stated that he is against vertical walls. He said that Peabody used to remove the dirt at the top of the highwal but Peabody does not do that any more. Sutton stated that the dirt collects rain and that increases the burden on the top of the highwall. The dirt soaks up the water and results in slides, or in complete collapse of the wall, as occurred on April 4 (Exhibit B, pp. 46-48).

Fred Leatherland, the water boy, stated that the slope is less dangerous, and he feels they have a better chance of getting out of the way if materials fall (Exhibit B, p. 52). He said that he does not like the ragged, vertical highwall that they have been having (Exhibit B, p. 54).

When the superintendent, Leonard Hughes, was interviewed, he stated unequivocally, and repeated it twice, that if the highwall had been sloped on April 4, the wall would not have toppled down (Exhibit B, pp. 59-60). He also stated that they had been having trouble with the highwall ever since 1971 (Exhibit B, p. 63).

When Bob Hart, Peabody's drilling and blasting manager, was interviewed, he stated that he had not talked directly to the people who work in the pit, and that he did not know what their opinion was (Exhibit B, p. 74).

Finally, Gaylon Leslie stated that he thinks blast casting works all right in the 5900 Pit, but that he does not think it works with the 1150 No. 2 Pit, and he said until somebody can show him a good highwall in that pit, he will be against use of blast casting in that area (Exhibit B, p. 74).

I believe that when one reviews all the testimony of the people who were down there exposed to the highwall, that Peabody cannot successfully argue that it did not know that that highwall was hazardous. If Peabody's management did not know it, it should have known it, because Bob Hart should have known and found out what the men felt who were working in that pit. For the reasons I have given, I find that a violation of section 77.1006(a) occurred. Having found a violation, it is necessary that I assess a penalty. Tazco, Inc., 3 FMSHRC 1895 (1981).

With respect to the six criteria, the parties' stipulations deal with two of those criteria. One of them is the size of the operator's business. Paragraphs 6 and 7 of the joint stipulations, which have been quoted above, show that a

of civil penalties would not adversely affect Peabod
to continue in business. Consequently, the penalty
have to be reduced under the criterion that payment
ties would cause the operator to discontinue in busi

There was a statement by one of the inspectors
effect that Peabody showed a good-faith effort to ac
compliance after the violation was cited. It has be
tice not to increase a penalty under that criterion
lack of good faith is shown, and it has been my prac
to reduce a penalty under that criterion unless ther
outstanding effort made to achieve compliance. If t
normal effort to achieve compliance, which appeared
situation in this case, then the penalty should neit
raised nor lowered under the criterion of good-faith
to achieve compliance.

Insofar as the history of previous violations i
cerned, Exhibit 15 in this proceeding shows that Pea
not previously been cited for a violation of section
Therefore, no portion of the penalty should be asses
the criterion of history of previous violations.

The two criteria of gravity and negligence rema
considered. As I have already indicated at some len
there is a considerable body of evidence showing tha
had a reasonable basis for assuming that if it adopt
blast casting method, which has been described above
was no reason to assume that a highwall would fall a
anyone.

The company had done that type of mining at min
other geographical locations and it had also succeed
using that method in the 5900 Pit at the Lynnville M
involved. Consequently, I do not think that I can a
Inspector Hensley that there was a high degree of ne
in the occurrence of the violation.

I believe that there was some ordinary negligen
cause as I have pointed out, I do believe that when
was giving advice to the company about how to achiev
mies with explosives, he should have followed up on
mendations, after they were adopted, by discussing t
mental nature of blast casting with the miners who w
posed to any hazards associated with those experimen
niques, even though the method was adopted with a go
belief that it would be safe. I believe that additi
should have been taken in determining just what was

terion of negligence.

When it comes to the criterion of the gravity of the violation, I must recognize the fact that the fall caused the death of one miner and completely covered up a 110-ton truck, as well as a pickup truck, along with doing some damage to a large shovel in the area. A fall of that magnitude is necessarily serious and I believe that a penalty of $1,000 should be assessed under the criterion of gravity, so that a total penalty f $1,500 is warranted for the violation of section 77.1006(a) alleged in Citation No. 2322072.

I shall now turn to the question of whether a violation f section 77.1001 occurred. Some conflicting evidence exists ith respect to that violation because, as Peabody's counsel ointed out in his argument, Inspector Bryant was at the Lynnville Mine on April 3, 1984, prior to the occurrence of the accident on April 4, 1984, and prior to issuance of Order No. 2322073 on April 5.

It is a fact that Inspector Bryant on April 3 was in the same area, which was later the subject of construction of a erm 8 feet high to protect people from any falls from the highwall which had been cited on April 5 for existence of loose and hazardous materials. The aspect of the evidence that makes it difficult to find a violation of section 77.1001 is that if Inspector Bryant saw that same area on April 3 and did not think the loose and hazardous materials constituted a violation, why would existence of those materials suddenly be a violation on April 4, when all people seem to agree that a massive fall of rock 174 feet long would not have adversely affected the remainder of the highwall at a place which was a distance of at least 500 feet from the place where the highwall collapsed?

I do not know whether the preponderance of the evidence ould support a finding of a violation of section 77.1001 ept for the fact that Gaylon Leslie was present after the accident had occurred, and he said, unequivocally, that he saw loose and hazardous materials on the highwall. I do not think that he would have stated that he saw loose materials if they had not existed and I do not think Inspector Hensley ould have either, for that matter.

Nevertheless, it is a fact that one inspector did not find loose material in a hazardous amount on April 3 and another inspector did find loose material on April 5. nother reason which supports the finding of a violation of section 77.1001 is that photographs were introduced in this

on April 5, 1984. Therefore, I find that there was a viol tion of section 77.1001.

Having found a violation, I must assess a civil penal In discussing the penalty assessment for the previous viol tion, I covered the two criteria of the size of respondent business and the fact that payment of penalties will not c respondent to discontinue in business.

The inspector indicated that a good-faith effort was to correct the violation. Achieving compliance was a simp matter insofar as 1,090 feet of the highwall was concerned cause that portion of the highwall was dangered off and th men were reinstructed concerning safe conduct near highwal Compliance was achieved with respect to the remainder of t highwall by the erection of an 8-foot berm at the bottom o the highwall. As I have already indicated above, since th was an instance of normal abatement, the penalty should ne be increased nor decreased under that criterion.

Insofar as the history of previous violations is con- cerned, Exhibit 15 shows that Peabody previously violated section 77.1001 once on May 17, 1982, and once on February 1984. In the legislative history, Congress indicated that wanted a civil penalty to be increased two or three times a previous penalty for a violation of the same mandatory standard which is before a judge or the Commission for ass ment of a civil penalty if that same standard has been vio lated several times immediately preceding the occurrence o the violation under consideration. 1/

In this instance, since one of the previous violation occurred almost 2 years before the violation here involved was cited, I do not think that that one would merit assess ment of any portion of the penalty under history of previo violations, but since one of the previous violations did o on February 10, 1984, just 2 months before the violation c here, I believe that I necessarily must assess some portio the penalty under history of previous violations. Therefo under that criterion, a penalty of $50 will be assessed.

The two criteria of gravity and negligence remain to considered. In evaluating the criterion of negligence, it appropriate to examine the entries regarding the highwall by Peabody's foremen in the daily onshift report. The ons report was introduced as Exhibit 13 in this proceeding. T

1/ S. REP. NO. 95-181, 95th Cong., 1st Sess. 43 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFET

"stable in some and some loose; rock falling due to rain". On the second shift, there is an entry, "unstable".

On March 5 for the first shift, there is an entry, "some areas have slides due to heavy rain". On the second shift, "several bad areas".

On March 6, first shift, "some slides, loose rock"; second shift, "some bad areas".

On March 7, first shift, "some areas fair; some have loose rock"; on the second shift, "some bad areas".

On March 8, on the first shift, "cleaned up slides; some areas not good"; second shift, "several bad areas".

On March 9, second shift, "some bad areas".

On March 12, the entry "ragged" appears. Charles Hester testified that an entry of "ragged" should not be interpreted to mean that the highwall was necessarily hazardous. Therefore, I am omitting from my discussion 17 references to the highwall as being "ragged".

On March 13, first shift, "some areas poor"; also on March 13, there is an entry "some small slides noticed during third shift; all men warned".

On March 14, first shift, "some areas poor; south end flagged and men warned on unstable highwall".

On March 15, first shift, "Squaw Creek truck refused to drive under highwall, so this area will be flagged and no personnel are to go under this wall until corrected".

On March 16, first shift, "keep all personnel away from highwall and loading spoil side only; poor condition; is not stable; area flagged"; second shift, "rocks falling from recent bad weather"; third shift, "very bad area; falling off due to heavy rain; all men warned of wall condition".

On March 17, first shift, "no one working under highwall; all operations will be performed under area of bad highwall". The foreman may have misstated himself in the entry just quoted, but that is the way the entry reads. The entry for the third shift on March 17 states existence of "bad rock slide but appears to be in stable condition".

of this".

On March 19, first shift, "some areas appear to be n stable".

On March 20, first shift, "some areas not stable; me warned"; third shift, "highwall in south end of pit is ve unstable due to rain. Men warned of said condition".

On March 21, first shift, "some areas poor. Incleme weather. Some areas not stable"; second shift, "poor in ing area"; third shift, "poor in south end, but appears t in a stable state".

On March 22, first shift, "some areas fair. Some ar have loose rock and slides". Third shift, "Poor conditio exist. All men warned of bad walls".

On March 23, first shift, "fair; some areas not good third shift, "poor".

On March 24, first shift, "Fair; some areas loose ro

On March 25, first shift, "Appears stable in work ar at present time".

On March 26, first shift, "loose rock; fair; some ar not stable".

On March 27, first shift, "fair; some areas not stab

On March 28, first shift, "water, mud, rocks coming highwall due to heavy rain"; third shift, "appears to be a stable condition".

On March 29, first shift, "fair; some areas poor"; t shift, "fair, but stable".

On March 30, first shift, "fair; some areas not real good"; third shift, "stable condition; men not working un highwall on third; also men warned of highwall condition"

On March 31, first shift, "fair; some areas poor".

All entries for April 1 and 2 indicated that the con of the highwall was "fair"; one entry for the second shif April 1 evaluated the highwall as "stable".

during the entire month of March and right up to the day before the accident occurred when a huge portion of the highwall fell. There was a considerable amount of negligence in Peabody's failure to take some corrective action to assure that the highwall was maintained in a safer condition than it was. As I have indicated in my findings of fact, Peabody found, after the fatal accident, that it could continue to utilize the blast casting method and still manage to put a slope on the highwall so as to provide it with additional stability which would avoid the vertical state which contributed to the fact that a huge portion of the wall suddenly fell on April 4 without prior warning. In such circumstances, I believe that a penalty of $2,000 should be assessed under the criterion of negligence.

In considering the gravity of the violation, it is necessary to bear in mind that the violation here under consideration is the loose and unconsolidated material which existed on the portion of the highwall which did not fall, as opposed to the portion which did fall. Those people who had examined the portion of the highwall which did fall all seemed to agree that it did not look as if it would fall on that particular day. The loose materials, however, were not confined to just that portion of the wall which fell because the inspector cited an expanse of 2,800 feet as having loose and hazardous and overhanging materials on it. While the order was modified, as I have explained in the findings above, to reduce the extent of the loose materials to 1,090 feet that were dangered off and to indicate that a berm was constructed along an expanse of 380 feet, the fact remains that an area of over 1,400 feet of the highwall had loose and unconsolidated materials on it.

The entries of the foremen in the onshift book, as given in detail above, do not specify the location of the loose materials they are describing in their frequent references to "bad areas" and "loose rock". Some of the witnesses stated that they had never seen a "good" highwall and Tom Hart testified that he never rated any highwall as being better than "fair", and that "fair" meant to him that it was safe to work under the wall. The fact that the foremen on several occasions warned the miners that it was not safe to work near the highwall is a further indication that they believed that the loose materials were hazardous. The preponderance of the evidence, therefore, supports a finding that the violation of section 77.1001 was a serious violation and that a penalty of $1,000 should be assessed under the criterion of gravity.

be assessed under the criterion of gravity, making a total p
alty of $3,050 for the violation of section 77.1001.

WHEREFORE, it is ordered:

Peabody Coal Company, within 30 days from the date of this decision, shall pay penalties totaling $4,550.00. The penalties are allocated to the respective violations as foll

Citation No. 2322072 4/5/84 § 77.1006(a)	$1,500
Order No. 2322073 4/5/84 § 77.1001	3,050
Total Penalties Assessed in This Proceeding ...	$4,550

Richard C. Steffey
Administrative Law Judge

Distribution:

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 84-72
	:	A.C. No. 33-02312-03506
v.	:	
	:	Rice No. 3 Strip
R & F COAL COMPANY, Respondent	:	

DECISION

Appearances: F. Benjamin Riek III, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner; Peter J. Zinaich, Esq., Pettay, Mosser & Tabacchi, Cadiz, Ohio, for Respondent.

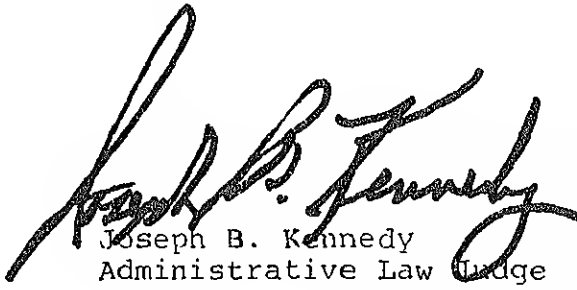
Before: Judge Kennedy

The captioned matter came on for an evidentiary hearing in Cleveland, Ohio on Thursday, April 18, 1985. After both parties rested, the solicitor sought a voluntary nonsuit by moving to withdraw the penalty petition and vacate the challenged citations. The operator demurred unless the solicitor would consent to entry of the trial judge's tentative bench decision as an advisory decision. The solicitor readily consented.

Whereupon the trial judge granted the motion to withdraw and vacate. Thereafter the trial judge delivered for the record his advisory decision finding the violations charged did not, in fact, occur and strongly recommending that for the future the Secretary take action to correct the due process deficiencies noted in MSHA's enforcement of 30 C.F.R. 77.1606(c).

The premises considered, it is ORDERED that the penalty petition be DISMISSED and that the matters entered of record

of this matter.



Joseph B. Kennedy
Administrative Law Judge

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 84-87-M A.C. No. 05-03007-05509
v.	:	Ralston Quarry
ASPHALT PAVING COMPANY, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicit U.S. Department of Labor, Denver, Colorado, for Petitioner;
Shane Rogers, Safety Director, Asphalt Paving Company, Golden, Colorado, for Respondent.

Before: Judge Carlson

This case, heard under the provisions of the Federal Min Safety and Health Act of 1977 (the Act), arose out of the inv gation of a conveyor accident which occurred at respondent's rock quarrying and crushing operation on November 10, 1983. Respondent, Asphalt Paving Company (Asphalt), concedes the tw violations cited by the investigating inspectors, but contest the appropriateness of the penalties proposed by the Secretar of Labor (the Secretary). For Citation No. 2099795, the Secretary proposes a civil penalty of $1,500.00. For Citatio No. 2099796 he proposes $500.00. At the evidentiary hearing held in Denver, Colorado on March 20, 1985, the Secretary was represented by counsel; Asphalt was represented by its safety officer. Both parties waived the filing of post-hearing brie

REVIEW OF THE FACTS

The facts giving rise to the two citations in this case are essentially undisputed. Respondent conducts a stone quarrying and crushing operation in connection with its pavin business. At the time of the accident which produced the citations, it employed approximately 200 persons. Of these, 8 to 12 were employed in the quarrying and crushing operation which was subject to the regulatory provisions of the Act.

become clogged, necessitating cleaning. The conveyor is electrically powered; the controls (on-off switches) are located in a small building some 80 feet from the conveyor.

One mine employee, the crusher operator, had been working with another employee, a laborer, cleaning frozen mud from the conveyor rollers. The latter worker became cold and walked to the conveyor-control building to warm up. While he was there, the crusher operator came to the building, switched on the power, returned to the conveyor, crawled inside its frame, and proceeded to knock mud from the return roller with a claw hammer. The man was caught up between the moving belt and roller. He suffered severe, non-fatal injuries before he could be freed.

The laborer, who claimed to have specifically warned the victim against working on the machine with the power on, had quickly turned off the power when he saw that his co-worker was in difficulty.

Asphalt had a general policy that electrical power was to be locked out during maintenance and repair procedures. The company did not enforce that policy, however, for cleaning mud from the return pulleys. Instead, Asphalt expected its employees to work as a team with one at the controls in the control building, and the other at the roller. Upon a signal from the person at the roller, the employee at the control would "bump" the belt forward a short distance, thus exposing a fresh segment of the roller. The team would repeat this procedure several times to clean the entire surface of the roller (Tr. 58-60, 64-65). In addition, the employee at the roller was expected to keep his distance from the roller by using a shovel to scrape off the accumulated mud (Tr. 65).

Upon the completion of their investigation, the federal inspectors issued two citations. In the first, Citation No. 2099795, they charged Asphalt with a violation of 30 C.F.R. § 56.14-33, which provides:

> Pulleys of conveyors shall not be cleaned manually while the conveyor is in motion.

The Secretary proposes a penalty of $1,500.00 for this violati

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

The Secretary asks for a $500.00 penalty for this violation.

DISCUSSION

Since Asphalt admits the violations charged, the only issue to be decided here is what penalties are appropriate under the Act. Asphalt complains that the proposed penalties of $1,500.00 and $500.00 are excessive. For the reasons which follow, I must agree.

Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to remain in business, and the gravity of the violation itself.

The evidence discloses that the overall size of Asphalt's business was moderate, whereas the mining portion of the business was quite small. Records introduced by the Secretary show that in the two years immediately prior to the violations in this case the company had 36 paid violations. The penalties were mostly small, totaling $1,111.00. For an operator of Asphalt's size, this history of prior violations is moderate. The evidence indicates that Asphalt's ability to continue in business would not be adversely affected by payment of the penalties proposed by the Secretary. The evidence also indicates that Asphalt abated both violations swiftly. The violations were of a high order of gravity. The severe injuries received by the crusher operator are ample proof of that.

We now consider the most important penalty criteria under the facts of this case: negligence. Asphalt maintains that the

violations would not have occurred had the accident victim observed the well-known company policies concerning cleaning of the conveyor rollers. Plainly, this plea enjoys some validity. Such evidence as there is shows that the crusher operator, for reasons we shall never know, decided to start the conveyor himse and to clean it himself. Worse, he climbed several feet into the framework of the machine to work on the roller at close rang I am inclined to give credence to the evidence which shows that Asphalt had instructed its workers to use a two-man team to clea the rollers - one starting and stopping the belt on signal, the other knocking the mud off with a shovel. 1/

Had the victim followed those precepts there presumably would have been no violations of 30 C.F.R. § 56.14-33. The conveyor would not have been "in motion" while the cleaning took place. 2/

The question about "lockouts" under 30 C.F.R. § 56.12-16 is more complex. Arguably, the two-man procedure used by Asphalt i a measure, other than lockout, "which shall prevent the equipmen from being energized without the knowledge of the individuals working on it." I decline to decide that question because it is not truly in issue. It was not briefed, and, indeed, was never directly raised or discussed at the hearing. 3/ What is clear is this: when the crusher operator proceeded to energize the conveyor with the intent of working on it himself, he violated that part of the standard which requires that "/e/lectrically powered equipment shall be deenergized before mechanical work is done ...."

1/ As to whether cleaning with a shovel is a "manual" cleaning under the standard need not be decided in this case. Cleaning with a short claw hammer clearly is "manual" since common sense dictates that it is not appreciably safer than use of the hands alone.

2/ One of the federal inspectors testified that the laborer who had been working with the accident victim earlier in the morning admitted that it was "common practice" to clean the conveyor bel while it was in motion. The matter was apparently pursued no further. The declarant may well have been referring, in an unsophisticated way, to the two-man "bumping" procedure for cleaning. It is clear that the declarant himself understood that it was wrong to try to clean a roller in the way the crushe operator was doing at the time of his accident. I accord the admission little weight.

some sanction, some form of meaningful discipline, if he vio
safety practices. Without such an expectation, company safe
rules may merely be seen by workers as non-compulsory compar
preferences.

In the present case I am convinced that the accident vi
had to know that he was ignoring safety rules. Lacking evid
that he could reasonably expect the imposition of substantiv
disciplinary measures by management, however, I must find th
some degree of fault still resides with Asphalt.

Having carefully considered all the evidence bearing up
the statutory criteria for penalty assessments, with particu
emphasis on the negligence factor, I conclude that the appro
assessments are as follows:

For Citation No. 2099795, $800.00
For Citation No. 2099796, 200.00

CONCLUSIONS OF LAW

Consistent with the findings contained in the narrative
portion of this decision, the following conclusions of law a
made:

(1) The Commission has jurisdiction to decide this cas

(2) Asphalt, the respondent, admits violation of 30 C.F.R. § 56.14-33 as charged in Citation No. 2099795 and violation of 30 C.F.R. § 56.12-16 as charged in Citation No. 2099796.

(3) A civil penalty of $800.00 is appropriate for the violation of 30 C.F.R. § 56.14-33.

(4) A civil penalty of $200.00 is appropriate for the violation of 30 C.F.R. § 56.12-16.

ORDER

Accordingly, it is ORDERED that Asphalt pay a total civ
penalty of $1,000.00 within 30 days of the date of this deci

John A. Carlson

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Mr. Shane Rogers, Safety Officer, Asphalt Paving Company, 4802 West 44th Avenue, Golden, Colorado 80403 (Certified Mail)

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CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 81-620-R Order No. 853383/8/25/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Ireland Mine

DECISION

Appearances: Robert M. Vukas, Esq., Consolidation Coal Company, Pittsburgh, Pennslyvania, for Contestant;
David T. Bush, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, Pennsylvania, for Respondent.

Before: Judge Fauver

This proceeding was brought by Consolidation Coal Company under section 105(d) of the 1977 Federal Mine Safety and Health Act, 30 U.S.C. § 801, et seq., to review an imminent danger withdrawal order issued by Federal mine inspectors.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable and probative evidence establishes the following:

FINDINGS OF FACT

1. On August 25, 1981, Federal mine inspectors Lyle Tipton and Donald Moffett conducted a regular inspection at Consolidati Coal Company's Ireland Mine.

2. During this inspection the inspectors were accompanied representative Robert Clark and United Mine Workers' safety representative Harold Lewis.

3. The purpose of such inspection was to inspeet the haulage in the area from the portal to the rotary dump.

4. During the inspection the inspectors and others reached an S curve in the track where they stopped to wait for an approaching train to pass.

6. The train, a locomotive pulling coal cars, passed through the S curve and over the track switch at a high rate of speed. Its rate of speed was not necessary to negotiate the curve or ascend the grade following the curve, but was an excessive and dangerous rate of speed.

7. Based upon their observation of the speed of the locomotive, the inspectors issued an imminent danger order (No. 853383), which alleged the following condition:

> The No. 46 50 ton haulage locomotive operated by Leonard Parsons and pulling 37 (20 ton) loaded mine cars followed by No. 96 50 ton locomotive operated by Gary White was observed operating at an unsafe speed unreasonable for track and mine conditions around an 'S' turn and through a track switch. This order will not be terminated until Norbert Becker, principal officer of Health and Safety for this mine, instructs these motormen to pull their trip through this area at a reasonable safe speed.

DISCUSSION WITH FURTHER FINDINGS

The inspection party was stopped short of the S curve by a motorman, because a locomotive pulling coal cars was approa the curve. Upon observing the speed of the train, Inspector told the Company representative, Clark, that he believed the train was moving too fast and should be slowed down. Clark u a phone to order the locomotive operator to slow down the tra The train, however, did not slow down and at that point Inspe Tipton talked with Inspector Moffett and both agreed that an imminent danger existed. Inspector Tipton then instructed Clark to stop the train under a section 107(a) order.

The Union representative, Lewis, also an eye-witness, ag that the train was traveling too fast and that an imminent da existed. To illustrate how fast the train was moving, Lewis testified that, although he could normally count the coal car in a moving train, this train was moving so fast that he coul not count the cars. He had never seen a mine train traveling that fast in his experience.

The [illegible] installed a switch in the tracks. The switch, ver which the train must pass, increased the danger of raveling at a high rate of speed at this location.

The term imminent danger is defined by section 3 of the ct as:

> the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

n Freeman Coal Mining Company v. Interior Board of Mine perations Appeals, 504 F.2d 741 (7th Cir. 1974), the court ffirmed the following test of whether an imminent danger exists:

> Would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm likely to occur at any moment but not necessarily immediately?

I find that the preponderance of the reliable and probative vidence established that Inspectors Tipton and Moffett exercised easonable judgment in concluding that an imminent danger existed.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Order No. 853383, issued by Inspectors Tipton and Moffett n August 25, 1981, was reasonably and justifiably issued based n the facts. The Secretary met his burden of proving the llegations of the order by a preponderance of the substantial, eliable, and probative evidence.

ORDER

WHEREFORE IT IS ORDERED that Order No. 853383, dated ugust 25, 1981, is AFFIRMED and this proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

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ECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 83-211 A.C. No. 46-01456-03541
v.	:	Federal No. 2 Mine
ASTERN ASSOCIATED COAL CORP., Respondent	:	

DECISION

ppearances: Kevin C. McCormick, Esq., Office of the Solicitor, U.S. Department of Labor, Pittsburgh, Pennsylvania, for Petitioner; R. Henry Moore, Esq., Rose, Schmidt, Dixon & Hasley, Pittsburgh, Pennsylvania, for Respondent.

efore: Judge Fauver

This civil penalty case involves an order, No. 2115661, ssued by a Federal mine inspector under section 104(d)(2) f the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. The order alleges a violation of 30 C.F.R. 75.400 at Eastern's Federal No. 2 Mine, as follows:

> Damp to wet coal fines were being stockpiled in the #4 crosscut of the 10 Right Section Longwall #1 belt. The stockpile of fines was about 18 feet long, 15 feet wide, and about 6 inches deep. This belt is examined each production shift by a certified foreman and this condition was easily visible to any miner passing this area.

Having considered the hearing evidence and the record as whole, I find that a preponderance of the reliable, probative, nd substantial evidence establishes the following:

1. Respondent's Federal No. 2 Mine is an underground coal mine that produces coal for sale or use in or affecting interstate commerce.

2. On February 18, 1983, Federal Mine Inspector Terry Palmer inspected the subject mine and observed an accumulation of coal fines stockpiled in No. 4 crosscut in 10 Right section. The accumulation covered the floor of the crosscut, and was black, about 18 x 15 feet, and up to 6 inches deep. It was wet in the middle and damp to dry toward the edges. About three feet of the edge area had a thin dry crust and when the inspector tamped this area the material did not exude moisture. This part of the accumulation was about three or four feet from the belt rollers.

3. The accumulation was intentionally stored there about 16 days before the inspection, when the belt line had been extended about 200 feet.

4. The belt entry was about 15 feet wide. A 110-volt control wire ran up the heading and the belt was transporting coal at the time of the inspection.

5. Samples of the accumulation "in place" were not taken to test combustibility, but some samples were taken of material after it was put on the belt conveyor during the abatement of the cited condition. The material placed on the belt was a mixture of the wet and dry parts of the accumulation. The samples of the mixed material showed 21% moisture, 43% ash, and the rest presumably coal.

DISCUSSION WITH FURTHER FINDINGS

Pursuant to the safety standard (30 CFR § 75.400), coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials shall
to accumulate in any active
d, which is a statutory
is originally included in
eliminating fuel sources
nes. By prohibiting accumulat
empted to achieve one of
at is, the prevention of
rising from explosions and
Coal Corp., 1 FMSHRC 1954

Consistent with this broad policy to protect the health safety of miners, the Commission has further defined the ours of this standard. For example, in Old Ben Coal oration, 2 FMSHRC 2806 (1980), the Commission ruled that ccumulation under 30 C.F.R. § 75.400 exists "where the tity of combustible materials is such that, in the gment of the authorized representative of the Secretary, ikely could cause or propagate fire or explosion if an tion source were present." The Commission also noted the actual or probable presence of an ignition source ot an element of the violation. So long as an accumulation combustible materials exists, there is a violation of section 304(a) and 30 C.F.R. § 75.400. Old Ben Coal oration, 1 FMSHRC 1954 (1979).

Under these principles, it is clear that a violation of .F.R. § 75.400 occurred in this case.

The standard by its terms applies to "coal dust... e coal and other combustible materials" (30 C.F.R. § 00, emphasis added). Inspector Palmer visually identified coal fines as small particles of coal, too large to be idered coal dust, yet too small to be classified as e coal. It was, nevertheless, an accumulation of coal. efore, under the standard, Respondent was not permitted tore or allow the coal fines to accumulate in an active ing of the mine.

The fact that the center of the accumulation was wet not preclude a finding of a violation under this dard, because water does not inert coal. In the t of a mine fire, the heat from the flames could dry out wet portions of the coal, and thus provide additional for the fire. Water on the coal would only slow down burning process; it would not make the coal incombustible. hermore, only a part of the accumulation was wet. The r edges of the fines had begun to dry out. According to er, the edges of the accumulation were dry enough to nsify an existing mine fire and could possibly cause a if an ignition source were close by. In a somewhat lar case, Judge James Broderick found a violation of 30 R. § 75.400 even where the accumulations were so wet that could not be shoveled, United States Steel Mining, Inc., SHRC 1873 (1983). In that case, rock dust had to be ied to soak up the water before the accumulation could be ved. Despite that fact, Judge Broderick found that there an accumulation of combustible material in violation of .F.R. § 75.400. In the instant case, there was no such ical y removing the coal fines, and only a portion had

The fact that Eastern's sample of the accumulation showed approximately a 64% incombustible content is no defense to the charge. First, the combustible content of the accumulation is not relevant to 30 C.F.R. § 75.400. That section concerns the accumulation of coal dust, loose coal and other combustible materials in the active workings of a mine. It does not address the combustible content of any particular materials. Section 75.403 does address this issue as it relates to permissible amounts of rock dusting in particular areas of the mine. But this case involves an accumulation of coal fines left in a crosscut for over two weeks, not an issue whether the roof, ribs and floor were sufficiently rock-dusted to meet permissible limits.

Second, the sample taken is not representative of the accumulation, because it was not taken until the fines, both wet and dry, had been placed on the belt line and mixed, thereby changing its previous separate consistency.

I find that this is a serious violation. With an energized belt line running in close proximity to the coal fines, the arcing or sparking from a severed power cable or a stuck roller on the belt line could be a sufficient ignition source to cause an explosion or fire in the area. The accumulation of coal fines could intensify a fire or explosion and could possibly cause a fire if there was an ignition source close by. As mentioned, the fact that some of the coal fines were wet did not make the accumulation incombustible because water does not render coal inert, and because the outer edges of the accumulation were only damp or dry.

Respondent was negligent in storing and leaving the accumulation in the mine, because by the exercise of reasonable care it could have prevented the violation. Respondent contends that the material was stored in No. 4 crosscut because, when it was first discovered (February 3, 1983) the belt had already been dismantled, and "material could not be placed immediately in the belt and taken out of the mine" (Respondent's Brief, p.4). However, when the belt was assembled and running again by February 8, the accumulation could have been removed from the mine but was not removed. Respondent contends that the material was left there because it was so wet that it presented no hazard, and the belt foreman was keeping an eye on it so that when it dried out it would be promptly removed. This vague procedure of "keeping an eye on" an accumulation of coal fines is not permitted by the safety standard. The standard prescribes the accumulation of combustible material in the

workings of a mine. Wet coal is combustible, because can dry out the moisture and then iguite the coal. r, a substantial part of this accumulation was only dry and was thus more readily combustible than the t.

e parties have stipulated as to the rest of the six ry criteria for assessing a civil penalty, that is: e of the operator (large) and the mine (large); a penalty will adversely affect Eastern's ability in in business (no); whether the condition cited ely abated in good faith (yes); and Eastern's of previous violations (903 paid violations ng to $106,409).

conclude that special findings in a section 104(d)(2) "significant and substantial" or "unwarrantable") are viewable in a civil penalty proceeding. However, on the findings as to negligence and gravity, above, affirm the inspector's findings that the violation ignificant and substantial" and "unwarrantable" if I eviewing those allegations of the order.

CONCLUSIONS OF LAW

. The Commission has jurisdication in this proceeding.

. On February 18, 1983, Respondent violated 30 C.F.R. 00 as alleged in the "Condition or Practive" part of section 104(d)(2) Order No. 2115661.

. Considering the criteria for assessing a civil y under section 110(i) of the Act, Respondent is ED a civil penalty of $305 for the above violation.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay a penalty of $305 within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Judge

ibution:

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